Supreme Court, U.S.
FILED

99 39 JUL 1 - 1999

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No.

In The
Supreme Court of the United States
October Term, 1999

FRANK QUINTERO, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

G. RICHARD STRAFER
G. RICHARD STRAFER, P.A.
2400 South Dixie Highway
Miami, Florida 33133
Telephone: (305) 857-9090

6 4 P

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE PROPER APPLICATION OF COLLATERAL ESTOPPEL FOLLOWING THE RETURN OF A MIXED VERDICT IN A CRIMINAL CASE REQUIRES COURTS TO "Rationalize" THE JURY'S ACQUITTALS WITH THE JURY'S INABILITY TO REACH A VERDICT ON OTHER COUNTS?

II.

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND PRINCIPLE OF RES JUDICATA REQUIRE THE GOVERNMENT TO BRING ALL CHARGES INVOLVING THE SAME TRANSACTION OR SERIES OF TRANSACTIONS AGAINST A DEFENDANT IN A SINGLE PROSECUTION, RATHER THAN IN SUCCESSIVE INDICTMENTS?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings:

The Hon. Edward B. Davis, U.S. District Court judge;
Adelberto Jordan, Assistant U.S. Attorney;
Robert C. Josefsberg, Esq.;
Paul Pelletier, Assistant U.S. Attorney;
Frank Quintero, Jr. Esq.;
Anne Schultz, Assistant U.S. Attorney;
Robert K. Senior, Assistant U.S. Attorney;
G. Richard Strafer, Esq.

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OPINION BELOW

The January 22, 1999, opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Quintero*, 165 F.3d 831 (11th Cir. 1999). A copy of *Quintero* is attached hereto as **APPENDIX A**.

JURISDICTION

The opinion of the Eleventh Circuit in *Quintero* was filed on January 22, 1999. The Eleventh Circuit denied rehearing on April 2, 1999. *See* **APPENDIX B**. This petition for a writ of certiorari follows within 90 days of the latter date. *See* Supreme Court Rules, Rule 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall ... be subject for the same offense to be twice put in jeopardy for life or limb...." U.S. CONST., AMEND. V.

STATEMENT OF THE CASE[1]

A. Procedural History

On December 19, 1995, the government returned a second superseding indictment against Miami attorney Frank Quintero, Jr., and 13 co-defendants. (R1-270; hereinafter "***Quintero I***"). Counts

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[1] "R__" refers to the consecutively numbered items contained in the Record-On-Appeal in the Eleventh Circuit below.

2, 3 and 18 charged Quintero with conspiracies to import cocaine, to distribute cocaine and to launder money. *See* 21 U.S.C. §§ 953, 846; 18 U.S.C. §§ 1956(a)(1), 1956(a)(2) and 1957. He was also charged in Counts 19 and 21-26 with 7 substantive counts of money laundering under § 1956(a).

The conspiracy counts expressly relied upon 169 "overt acts." Some of these overt acts corresponded directly to the allegations in the 7 substantive counts. Others consisted of additional "financial transactions" allegedly committed by Quintero. Although the government could have, it did not separately charge Quintero with substantive money laundering counts based upon these "financial transactions". *See* 18 U.S.C. §§ 1956 and 1957.

The government did ***not*** claim that Quintero directly participated in any drug shipments or deliveries. Rather, the drug conspiracy charges were based on a money laundering theory. That is, the government claimed that by representing cocaine traffickers in various civil and criminal matters and by helping them conduct financial transactions, he became a "knowing" member of the drug conspiracies. (R7-892-3; R26-13, 26; R30-99, 115.)[2]

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[2] The government relied upon *United States v. Tokars*, 95 F.3d 1520 (11th Cir. 1996), *cert. denied*, 520 U.S. 1151, 117 S.Ct. 1328, 137 L.Ed.2d 489 (1997); *United States v. Knowles*, 66 F.3d 1146 (11th Cir. 1995), *cert. denied*, 517 U.S. 1149, 116 S.Ct. 1449, 134 L.Ed.2d 568 (1996); and *United States v. Orozio-Prada*, 732 F.2d 1076 (2d Cir.), *cert. denied*, 469 U.S. 845, 105 S.Ct. 154, 83 L.Ed.2d 92 (1985), for its theory of prosecution that "a criminal defense attorney" engaged in "money laundering" was automatically guilty of the drug conspiracies which generated the money that was laundered. (R7-892-6.)

In July and August, 1996, Quintero went to trial alone. The jury acquitted him of the drug distribution conspiracy (Count 3), a portion of the money laundering conspiracy (Count 18(a)) and 6 of the 7 substantive money laundering counts (Counts 21-26). The jury could not reach a verdict as to Counts 2, 18(b)-(c) and 19. However, the district court then granted Quintero's motion for a judgment of acquittal on Count 2, finding that the government had failed to prove Quintero's criminal intent. (R7-922-4, 8.) Thus, as a result of the verdicts and rulings in ***Quintero I***, only two charges remained pending against Quintero -- the two remaining subparts of the money laundering conspiracy (Count 18(b) and (c)) and one substantive charge of money laundering under 18 U.S.C. § 1956 (Count 19).

Prior to the retrial on Counts 18(b), 18(c) and 19, the government obtained a third superseding indictment from the grand jury ("***Quintero II***"). Among other things, ***Quintero II*** included 13 "new" substantive money laundering counts under § 1956. Both the government and the Eleventh Circuit in this case have acknowledged that these "new" counts were, without exception, based on overt acts charged in and/or evidence admitted against Quintero in ***Quintero I***.

On August 7, 1997, Quintero moved to dismiss ***Quintero II*** on the basis of Double Jeopardy and collateral estoppel. (R8-1012.) In an "Omnibus Order" issued on August 20, 1997, the district court granted in part and denied in part that motion. (R9-1036.) *See* **APPENDIX C**. The court dismissed the "new" counts under collateral estoppel, finding that all of the acquittals were based on findings (either by the court or the jury) that Quintero lacked the requisite criminal intent. (R9-1036-6.) The court noted

that Quintero "never denied" undertaking most of financial transactions which formed the basis of both the drug and money laundering conspiracy charges. (R9-1036-6.) Therefore, "[n]o rational juror could have acquitted Quintero on the basis that he did not do these things." (R9-1036-6.) Rather, "[t]he jury had to acquit Quintero on the grounds that he did not undertake the acts with the intent of furthering a money laundering conspiracy." (R9-1036-6-7.) Finally, the court found that the jury's acquittal on the substantive money laundering counts was based on similar findings by the jury that Quintero lacked "the intent to promote the carrying on of specified unlawful activity." (R9-1036-7.)

Based on these factual findings about its own and the jury's verdicts, the court barred the "new" charges. (R9-1036-6.) The court, however, refused to apply the same reasoning to the mistried counts. (R9-1036-4.) According to the court, the collateral estoppel doctrine only applies to charges brought ***after*** an initial verdict but ***not*** to hung jury mistrials. (R9-1036-4.) Quintero appealed the latter ruling to the Eleventh Circuit, and the government cross-appealed the dismissal of counts 18(a), 25, 27, 30, 31, 33 and 34.

B. STATEMENT OF THE FACTS

For purposes of this Petition only, Quintero adopts the factual presentation contained in the district court's August 20, 1997, "Omnibus Order." *See* **APPENDIX C**.

C. THE OPINION OF THE ELEVENTH CIRCUIT

On appeal, the government claimed that the district court erred in construing the acquittals as having been based on findings concerning Quintero's lack of *mens rea*. According to the govern-

ment, courts are required to apply collateral estoppel in a way that will "rationally reconcile[]" any acquittals with the jury's ***inability*** to reach a verdict on other counts. Government's Brief, at p. 27. The government based this construction of collateral estoppel on precedents concerning inconsistent verdicts. *See* Government's Brief, at pp. 42-43, citing *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984); *Dunn v. United States*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932).

Quintero argued that other Panels of the Eleventh Circuit and at least five other circuits had already rejected this argument. *See United States v. Shenberg*, 89 F.3d 1461, 1478 (11th Cir. 1996), *cert. denied sub nom. Sepe v. United States*, 519 U.S. 1117, 117 S.Ct. 961, 136 L.Ed.2d 847 (1997); *United States v. Corley*, 824 F.2d 931 (11th Cir. 1987); *United States v. Romeo*, 114 F.3d 141 (9th Cir. 1997); *United States v. Bailin*, 977 F.2d 270 (7th Cir. 1992); *United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989), *cert. denied*, 493 U.S. 1083, 110 S.Ct. 1142, 107 L.Ed.2d 1046 (1990); *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979); *Green v. United States*, 426 F.2d 661 (D.C. Cir. 1970) (per curiam). Alternatively, Quintero argued that the "new" counts in ***Quintero II*** were barred under a "due diligence" doctrine embodied in the Double Jeopardy Clause itself. *See Rashad v. Burt*, 108 F.3d 677, 679-80 (6th Cir. 1997), *cert. denied*, 522 U.S. 1075, 118 S.Ct. 850, 139 L.Ed.2d 751 (1998); *United States v. Reed*, 980 F.2d 1568, 1575 (11th Cir.), *cert. denied*, 509 U.S. 932, 113 S.Ct. 3063, 125 L.Ed.2d 754 (1993).

The Eleventh Circuit in *Quintero* adopted the government's argument, holding that in order to collaterally estop a trial on any of the new or leftover counts at issue in ***Quintero II***, the jury's

inability to reach a verdict on original counts 18 and 19 had to be "reconcile[d]" with the acquittals. *United States v. Quintero*, 165 F.3d at 837. Instead of analyzing how the jury (and, indeed, the district court) acquitted Quintero, the Eleventh Circuit worked backwards from the mistried counts, finding that the acquittals could not have been predicated on a finding that Quintero lacked criminal intent, because criminal intent was also an element of the mistried counts. To justify the jury's refusal to acquit Quintero on these counts, the court speculated that the jury may simply have found that Quintero did not "agree" to engage in the conspiracies. *Id.* at 837-838. Since "agreement" was not an element of either the new or mistried substantive money laundering counts, the court ruled that collateral estoppel did not bar a retrial on ***any*** of the charges at issue in the direct or cross-appeals. The Eleventh Circuit then completely ignored Quintero's "due diligence" theory.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE USE OF THE "INCONSISTENT VERDICT" DOCTRINE TO PERMIT SUCCESSIVE PROSECUTIONS WHICH WOULD OTHERWISE BE BARRED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL

To bar a prosecution under collateral estoppel, a defendant must show that: (1) a verdict in a first proceeding was based on a particular finding of fact; and (2) the government in a subsequent proceeding has charged crimes which require proof, as an essential element, of that same fact. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The Eleventh Circuit in *Quintero* disagreed with the district court's analysis of the first

prong of this test by insisting that the jury's acquittals had to be rationally reconciled with the deadlocked counts. As demonstrated below, since a hung-jury mistrial is not a final "verdict" at all, it has no role in assessing how a rational jury ***did*** reach final verdicts (*i.e.,* the acquittals) on other counts. More importantly for purposes of this Petition, the position taken by the Eleventh Circuit herein conflicts with both other decisions within the Eleventh Circuit, as well as the decisions of at least four (4) other circuits. *See United States v. Romeo*, 114 F.3d 141 (9th Cir. 1997); *United States v. Bailin*, 977 F.2d 270 (7th Cir. 1992); *United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989), *cert. denied*, 493 U.S. 1083, 110 S.Ct. 1142, 107 L.Ed.2d 1046 (1990); *United States v. Corley*, 824 F.2d 931, 936 (11th Cir. 1987); *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979).

The issue of whether the existence of "hung" counts could influence the application of collateral estoppel was first addressed by the Second Circuit in *Mespoulede*. In that case, the defendant was charged in a two count indictment with conspiracy to distribute cocaine and with possessing cocaine on a particular occasion. The jury acquitted Mespoulede of the possession count but could not reach a verdict on the conspiracy charge, resulting in a mistrial on that count. *Mespoulede*, 597 F.2d at 332. The Second Circuit ruled that the government was estopped from retrying the defendant on the conspiracy count due to the basis for the acquittal. In so holding, the court squarely rejected the government's argument that the inconsistent verdict doctrine precluded ***or in any way influenced*** the application of collateral estoppel to hung jury mistrials:

We are told that extending collateral estoppel to the multicount indictment context is inconsistent with the undisputed rule that acquittal on one count of an indictment does not preclude a jury from relying on the same evidence for proof of other counts.... Thus, verdicts on different counts of the same indictment returned by one jury at the same time are valid even if the results are inconsistent. *See, e.g., Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932).... **But it hardly follows from the fact that a single jury in one trial is allowed to render inconsistent verdicts that a *second* jury in a *second* trial should be permitted to rely on the evidence rejected by the first.**

We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our jurisprudence. There is no question but that a jury in a criminal trial has the power to render a verdict of acquittal that is wholly at odds with the law and the facts.... We recognize that the jury is in a sense the conscience of the community and can, for example, render a verdict to mitigate an overly severe punishment.... Similarly, in compromising in order to reach a unanimous verdict, a jury is often fulfilling its role as a cross-section of the community that it is supposed to represent. Occasional anomalies are the price of unanimity.

Internal consistency, then, is not an end in itself, and it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results. **Allowing a second jury to reconsider the very issue upon which the defen-**

> **dant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause.**

Id. at 336-37 (italics in original; bold added; citations omitted). *Accord Frazier*, 880 F.2d at 883 (holding that "the *Dunn-Powell* rule" is inapplicable to the hung jury mistrial context, because the defendant is not seeking to undermine a single jury's verdict but "to prohibit a second jury from considering the hung jury counts on the ground that such consideration would require a verdict of guilty to be based on evidence that necessarily formed the basis of not guilty findings on other counts at the first trial," citing *Mespoulede*).

Relying upon *Mespoulede* and *Frazier*, the Seventh Circuit in *Bailin* also rejected the argument that the inconsistent verdict doctrine applied in the hung jury mistrial context, explaining:

> We believe that the rule permitting inconsistent jury verdicts in a single proceeding is inapplicable. Inconsistent simultaneous verdicts are permissible because the jury may have "properly reached its conclusion [on the conviction] ... and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion" on the acquitted count. *Powell*, 469 U.S. at 63-64, 105 S.Ct. at 476. Inconsistent verdicts are thus the price of jurors' inexperience, unanimity, and prerogative. ***This rationale does not apply to a retrial of mistried counts, because a new jury is impanelled for the retrial.***

977 F.2d at 277 (emphasis added), citing *Mespoulede* and *Frazier*.

Twelve years before its decision in *Quintero*, the Eleventh Circuit itself rejected the use of the "inconsistent verdict" doctrine to bar the application of collateral estoppel in *United States v. Corley*, 824 F.2d 931, 936 (11th Cir. 1987). In *Corley*, a jury acquitted Corley of substantive fraud charges but could not reach a verdict on a conspiracy count levied under 18 U.S.C. § 371. After the district court ruled that the acquittals were based on the jury's finding that Corley did not commit certain acts, it barred the government from relying on those same acts to prove the "overt act" element of the § 371 count in the retrial. The government argued on appeal that a rational jury could not have acquitted Corley of the substantive counts without also acquitting him of the conspiracy charge since there were no other "overt acts" committed other than the acts in the substantive counts. Hence, the government argued that the jury must have based its verdict on Corley's "character evidence." *Corley*, 824 F.2d at 936 & n. 8. In affirming the district court's application of collateral estoppel, the Eleventh Circuit rejected the government's claim that the acquittals had to be rationally reconciled with the deadlocked conspiracy count. Indeed, the *Corley* court assumed that the jury's refusal to acquit may have been *ir*rational: "At least one member of the jury believed that Corley was not guilty of the substantive count but that she was a member of the conspiracy, even though she did not commit any overt acts in furtherance of the conspiracy." *Id.* at 936.[3]

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[3] *See also Shenberg*, 89 F.3d at 1478 (agreeing with the analysis in *Bailin* and upholding the application of collateral estoppel to preclude the retrial of one of the mistried counts); *United States v. Whitaker*, 702 F.2d 901, 905 (11th Cir. 1983) (applying colla-

(continued...)

The Eleventh Circuit's construction of collateral estoppel also conflicts with the Ninth Circuit's opinion in *United States v. Romeo*, 114 F.3d 141 (9th Cir. 1997). In that case, the defendant was originally charged with two counts: (a) importation of marijuana and (b) possession with intent to distribute marijuana. The jury acquitted him of the possession charge but was unable to reach a verdict on the importation charge. The defendant thereafter sought to bar a retrial on collateral estoppel grounds. The Ninth Circuit agreed with the defendant, ruling that the acquittal was based on the jury's finding that the defendant lacked "knowledge" of the marijuana. *Romeo*, 114 F.3d at 143. Hence, the court barred the retrial on the mistried importation count due to the common "knowledge" element. In so ruling, the court expressly rejected the government's argument that the jury's inability to reach a verdict originally on the importation count somehow prevented the application of collateral estoppel:

> While [verdict] consistency may carry some weight when assessing verdicts of guilty and not guilty on related counts, [citation omitted], the argument has considerably less force when the contention is ... that the jury's ***verdict*** on one count is inconsistent with its ***failure to reach a verdict*** on another count.

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[3](...continued)
teral estoppel to bar the retrial of a mistried count and rejecting government's argument that "collateral estoppel should not be applied in this case because the first jury's verdict was inconsistent").

Romeo, 114 F.3d at 144 (emphasis in original).[4]

Thus, the government's argument, adopted by the Eleventh Circuit below in *Quintero*, that the ***non-verdicts*** represented by hung counts must be "rationalized" with the "inconsistent" ***acquittals***, is contrary to every Circuit decision that has considered the issue.

While demanding internal consistency, the Eleventh Circuit in *Quintero* did not reconcile its claim that the jury based the verdicts on the "agreement" element of the acquitted charges with the district court's non-appealable[5] finding that the verdicts were

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[4] *See also United States v. Stoddard*, 111 F.3d 1450, 1459 (9th Cir. 1997) (defendant's acquittal of drug conspiracy charge based on prosecution theory that defendant owned $74,000 of drug proceeds collaterally estopped subsequent indictment for tax evasion under 26 U.S.C. § 7206(1), because jury's rejection of the government's theory meant that jury found that the defendant did not know "of the conspiracy's object -- to sell marijuana"); *United States v. Seley*, 957 F.2d 717, 723 (9th Cir. 1992) (applying collateral estoppel to bar retrial on hung count of original trial); *United States v. Kramer*, 289 F.2d 909, 913-20 (2d Cir. 1961) (same).

[5] In *United States v. Garcia*, 78 F.3d 1517 (11th Cir. 1996), the Eleventh Circuit expressly held that when a district court enters a judgment of acquittal for a criminal defendant under Fed.R.Crim. P. 29 and, in doing so, makes a "finding that the government had failed to prove" the defendant's criminal intent, that finding is binding on the parties and the Court "for all time" and for all purposes, including the application of collateral estoppel. *Garcia*, 78 F.3d at 1521. A district court's Rule 29 opinions are conclusive, because they are not appealable. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

based on the "intent" element. The court in *Quintero*, at one point, claimed that Quintero's intent to engage in the drug conspiracy was materially different from the intent necessary to prove him guilty of the money laundering charges. *See Quintero*, 165 F.3d at 836. However, the court ignored the government's theory of prosecution -- *i.e.*, that Quintero evinced his intent to join the drug conspiracies by willfully committing the financial transactions alleged in the money laundering counts. *See* p. 3 & n. 2, *supra*. The *mens rea* elements of these charges, therefore, merged.

Nor would the Eleventh Circuit's theory "reconcile" the verdicts in this case, in any event. Its theory that the jury based its acquittals on a finding that the government did not prove the "agreement" element of the conspiracy charges did not explain why the jury also acquitted Quintero of 6 of the 7 ***substantive*** money laundering counts -- counts in which an "agreement" was not an essential element. Indeed, the government itself conceded in the district court that these verdicts were based on the jury's finding that Quintero lacked criminal knowledge and intent. (R6-849-8-9; *see also* Brief for the Appellant, at p. 39.) Hence, the Eleventh Circuit's "agreement" theory did not rationally explain the acquittals. In reality, the only way to "rationally reconcile" a mixed verdict containing both acquittals and hung counts is to ***never*** apply collateral estoppel to bar a retrial of the hung counts -- a result rejected by every Circuit, including the Eleventh Circuit itself in *Shenberg*.

II. BOTH THE DOUBLE JEOPARDY CLAUSE AND THE DOCTRINE OF RES JUDICATA IMPOSE A DUTY OF "DUE DILIGENCE" ON THE GOVERNMENT TO BRING ALL CHARGES INVOLVING THE SAME KNOWN TRANSACTIONS OR SERIES OF TRANSACTIONS IN A SINGLE INDICTMENT

A. DOUBLE JEOPARDY AND DUE PROCESS

The Double Jeopardy Clause of the Fifth Amendment provides that no one shall "be subject for the same offense to be twice put in jeopardy for life or limb." U.S. Const. amend V. Among the protections provided by this Clause is the assurance that a criminal defendant will not be subjected to "repeated prosecutions for the same offense." *Oregon v. Kentucky*, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 306 (1932). *Accord North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (footnotes omitted). Where successive prosecutions are involved, the Clause serves "a constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971).

Final judgments in favor of a criminal defendant need special protection because of the "unacceptably high risk that the Government, with its vastly superior resources, might wear down a defendant so that 'even though innocent, he may be found guilty.'" *United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), quoting *Green v. United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 223-24, 2 L.Ed.2d 199 (1957). This Court has recognized that federal prosecutors, in particular, are in a unique position to manipulate charges to thwart the protections of the Double Jeopardy Clause:

> ....For at common law, and under early federal criminal statutes, offense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense [Citation omitted.] In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, ***it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction.*** [Citation omitted.] As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced. [Citation omitted.] ***The federal courts soon recognized the need to prevent such abuses....***

Ashe v. Swenson, 397 U.S. 436, 446, n. 10, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) (emphasis added).

Quintero II represented precisely the type of "abuse" the Court foresaw in *Ashe*. The government not only knew about all "new" financial transactions at issue in ***Quintero II*** before the indictment in ***QUINTERO I*** was returned, most of the "new" counts in ***QUINTERO II*** were specifically listed as "overt acts" in the original ***QUINTERO I*** indictment itself.

Although the Court in *Ashe* "recognized the need to prevent ... abuses" resulting from the ability of prosecutors "to spin out a startlingly numerous series of offenses from a single alleged criminal transaction, in *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.E.2d 556 (1993), the Court held that in determining whether a successive prosecution is for the same offense as a previous one, courts should apply the test established in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76

L.Ed.2d 306 (1932). Under *Blockburger*, prosecutions do not violate the Double Jeopardy Clause if "each offense contains an element not contained in the other." *Dixon*, 509 U.S. at 696, 113 S.Ct. at 2856. Conspiracy and substantive crimes inherently contain different elements. *United States v. Felix*, 503 U.S. 378, 387-92, 112 S.Ct. 1277, 118 L.Ed.2d 25 (1992).

Therefore, the *Blockburger* test provides ***no*** protection for the problem recognized in *Ashe* and exemplified in *Quintero*. The acquitted drug and money laundering conspiracy charges at issue in ***QUINTERO I*** contained literally dozens of "financial transactions," each of which could be separately "spun out" and prosecuted as substantive money laundering offenses. By selectively choosing subsets of these potential offenses, the government could conceivably try Quintero in successive indictments until Quintero was convicted of something, his resources exhaused and his career ruined, or he died.

In *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the Court suggested that an exception to the otherwise inflexible *Blockburger* rule existed to prevent this parade of horribles. In *Brown*, the Court held that the Double Jeopardy Clause would ***permit*** successive prosecutions which would otherwise have been barred by *Blockburger* "[i]f the State [was] unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge [had] not occurred or [had] not been discovered ***despite the exercise of due diligence***." *Brown*, 432 U.S. at 169, n. 7, 97 S.Ct. at 2227, n. 7 (emphasis added). Several circuits have construed this language of *Brown* as likewise creating a "due diligence" rule that ***precludes*** successive prosecutions which would otherwise be permissible under

Blockburger. Indeed, it was the Eleventh Circuit in *Reed* which first construed *Brown* as creating such a doctrine.

In *Reed*, the defendant was originally prosecuted for drug conspiracies spanning the years 1978-1980. He was later prosecuted for engaging in a Continuing Criminal Enterprise ("CCE"), spanning a longer time frame, 1974-1989. The Eleventh Circuit held that even if the CCE charge included drug allegations which were ***not*** part of the original Section 846 charge, "the government failed to exercise due diligence" by not including those allegations in the original charges since "the government was aware of all overt acts alleged against Reed" in the subsequent CCE case. *Reed*, 980 F.2d at 1581, citing *United States v. Boldin*, 772 F.2d 719, 732 (11th Cir. 1985), *modified in part on other grounds*, 779 F.2d 618 (11th Cir.), *cert. denied*, 475 U.S. 1048, 106 S.Ct. 1269, 89 L.Ed.2d 577 (1986). As the Eleventh Circuit explained in *Reed*:

> In *Boldin*, the Court implied that the government was subject to a due diligence requirement that prevented it from bringing multiple prosecutions, even in the absence of a double jeopardy bar, where the government "knew or should have known of the appellant's participation in a continuing series of violations of section 848" at the time of the prosecution.

Reed, 980 F.2d at 1580 (citations omitted). *See also United States v. Harvey*, 78 F.3d 501, 506 (11th Cir. 1996) (government's lack of actual knowledge of Harvey's drug activities did not justify re-prosecution for CCE, in part, because government "should have known" of Harvey's conduct). *Cf. United States v. Maza*, 983 F.2d 1004, 1015 (11th Cir. 1993) (permitting the government to bring successive prosecutions in multiple districts by different prosecuting

authorities but cautioning that "where the government shows no separate facts on which to base its new prosecution, we might view with a jaundiced eye an attempt to re-try old facts on a new theory").[6]

Although the Eleventh Circuit appeared to base its "due diligence" doctrine on the Due Process Clause, rather than on the Double Jeopardy Clause of the Fifth Amendment, the Sixth Circuit has squarely held that the Double Jeopardy Clause requires the recognition of a due diligence exception to the *Blockburger* rule.

In *Rashad v. Burt*, 108 F.3d 677, 679-80 (6th Cir. 1997), *cert. denied*, 522 U.S. 1075, 118 S.Ct. 850, 139 L.Ed.2d 751 (1998), the defendant was originally charged with possessing over 650 grams of cocaine which had been seized from the basement of his residence. Thereafter, he was again charged with possessing over 650 grams of cocaine. This second charge was ostensibly based on cocaine seized from a hidden compartment in the defendant's vehicle. However, the two seizures occurred only a few weeks apart, during the same investigation and before the first case went to trial. Under these circumstances, the Sixth Circuit held that the second case was barred by Double Jeopardy. The court explained its reasoning quite simply: "[S]uccessive prosecutions based on the same 'fact situation' are barred by double jeopardy ***if the separate charges could have been joined and no significant additional fact was required in the second prosecution***." *Rashad*,

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[6] In permitting the multiple prosecutions under these circumstances, the Eleventh Circuit in *Maza* also questioned whether the "due diligence" language in *Brown* could be utilized against the government. *See Maza*, 983 F.2d at 1008. However, the court did not cite its earlier decision *Reed* in its opinion.

108 F.3d at 680 (emphasis added). In so ruling, the court was justifiably skeptical of the government's conduct, noting that "the separation of the charges into two trials [had] more to do with prosecutorial expediency -- the opportunity to try Rashad twice for a single criminal transaction -- than with substantive differences between Rashad's purportedly separate crimes." *Id.* The Sixth Circuit held that "[s]uch strategic maneuvering is forbidden by the Double Jeopardy Clause." *Id.*, citing *Jordan v. Commonwealth v. Virginia*, 653 F.2d 870, 873 (4th Cir. 1980) ("[i]t is well settled that double jeopardy protections may not be avoided by the simple expedient of exercising prosecutorial discretion to 'divid[e] a single crime into a series of temporal or spatial units,'" quoting *Brown*).

In *Quintero*, the government employed the same type of "strategic maneuvering" condemned by the Sixth Circuit in *Rashad*. Dissatisfied with the verdict in ***Quintero I***, it reshuffled the deck and selectively picked a handful of the multitude of "financial transactions" at issue in the broad conspiracy charges for which Quintero had been acquitted and charged them as substantive Section 1956 counts in ***Quintero II***. Given the total number of possible "transactions" alleged or introduced in ***Quintero I***, this process could presumably go on indefinitely until the government was sufficiently satisfied with the outcome. As the Eleventh Circuit recognized in *Maza*, "[t]he integrity of our system of justice would be threatened if prosecutors could 'shop' for a favorable judge or jury until they found one willing to convict or until a judge imposed the sentence the prosecutors felt was appropriately severe"). *Maza*, 983 F.2d at 1010.

Although the issue was squarely presented by the defendant in *Quintero*, the Eleventh Circuit rejected it *sub silentio*, creating

a split in the circuits with *Rashad*. Two other circuits have expressly disagreed with *Rashad*, holding that this Court's decision in *Dixon* requires the use of the *Blockburger* test under ***all*** circumstances, apparently no matter how abusive. *See United States v. Forman*, Case No. 98-1111 (6th Cir. June 21, 1999), 1999 U.S. App. LEXIS 13478); *United States v. Williams*, 155 F.3d 418 (4th Cir. 1998), *cert. denied,* ___ U.S. ___, 119 S.Ct. 626, 142 L.Ed.2d 564 (1999).

Dixon, however, did not address the potential for abuse caused by multiple, successive prosecutions ***by the same sovereign***. In *Dixon*, the Court was faced with a situation involving related charges brought by ***two different entities***. The first was a contempt charge brought against Dixon by the District of Columbia court for violating a bail order; the second was a narcotics charged brought by the government. Nor did the Court in *Dixon* address a fact pattern raising the specter of the type of abusive prosecution discussed previously in *Ashe*.

This Court should grant the instant Petition not only to resolve the split in the Circuits caused by the misapplication of *Dixon* by the Fourth, Sixth and Eleventh Circuits but to give meaning to the Court's announcement in *Ashe* that the Double Jeopardy Clause must provide ***some*** protection against "unfair and abusive reprosecutions" caused by the proliferation of ever more numerous and overlapping federal crimes. *See* p. 15 *supra*.

B. Res Judicata

Res judicata is a doctrine unto its own, independent of, and providing protection in addition to, the Double Jeopardy Clause:

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in [its] terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice, in order, when a man once has been acquitted on the merits, to enable the government to prosecute him again a second time.

United States v. Oppenheimer, 242 U.S. 85, 88, 37 S.Ct. 68, 61 L.Ed.2d 161. *See also Sealfon v. United States,* 332 U.S. 575, 578-79, 68 S.Ct. 237, 92 L.Ed.2d 180 (1948).

In civil cases, the doctrine of res judicata precludes a plaintiff from suing a defendant in successive complaints based upon causes of action that were, ***or could have been***, brought in the original complaint. *See generally Delta Air Lines, Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582, 586 (11th Cir. 1983); *Nilson v. City of Moss Point, Miss.*, 701 F.2d 556, 563 (5th Cir. 1983) (en banc); *Harmper Plastics v. Amoco Chemicals Corp.*, 657 F.2d 929, 945 (7th Cir. 1981). The doctrine "contemplates, at a minimum, that courts be not required to adjudicate, nor defendants to address, successive actions arising out of the same transaction...." *Nilson*, 701 F.2d at 563.

Unlike the *Blockburger* test, res judicata applies even if the causes of action are different, *i.e.,* even when they contain materially different elements of proof. *Harnett v. Billman*, 800 F.2d 1308, 1315 (4th Cir. 1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1571, 94 L.Ed.2d 763 (1987). The doctrine is judicially created, *see United States v. Barnette*, 10 F.3d 1553, 1561 (11th Cir.), *cert. denied*, 513 U.S. 816, 115 S.Ct. 74, 130 L.Ed. 28 (1994), and "is

grounded in a policy of encouraging litigants to raise all claims arising out of one transaction in a single suit." *Nilson*, 701 F.2d at 563.

If the Double Jeopardy Clause does not encompass a "due diligence" requirement -- a view, we submit, that does not follow from *Dixon*'s holding -- such a construction would not affect the application of res judicata. Indeed, there is no principled reason why the requirement that all civil causes of action be brought in one proceeding should not also apply to all criminal causes of action arising out of the same transaction. As Justice Holmes observed: "It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt." *Oppenheimer*, 242 U.S. at 87, 37 S.Ct. at 69. For that reason, the Court should hold criminal plaintiffs, *i.e.*, prosecutors, to the same standard as the courts hold civil plaintiffs.

Recognizing that the doctrine of res judicata imposes a "due diligence" requirement on prosecutors in criminal cases would not impede the ability of prosecutors to ferret out crime. Prosecutors would still have one full bite of the apple against a defendant for conduct arising out of the same act or transaction or series of transactions. Nor would the application of this doctrine to criminal cases prove to be "unworkable" or "unstable in application." *Dixon*, 509 U.S. at 709, 711, 113 S.Ct. at 2863. The test would be simple: Could the added charges have been joined as part of the original proceeding prior to the first trial? This inquiry is one in which district courts routinely engage under Fed. R. Crim. P. 8 in determining whether offenses and defendants are properly joined in an indictment. *See generally United States v. Weaver*, 905 F.2d

1466, 1476 (11th Cir. 1990), *cert. denied*, 498 U.S. 1091, 111 S.Ct. 972, 112 L.Ed.2d 1058 (1991); *see, e.g.*, Ore. Stat. § 131.515(2) ("No person shall be separately prosecuted for two or more offenses based upon the same criminal episode, if the several offenses are reasonably known to the appropriate prosecutor at the time of the commencement of the first prosecution and establish venue in a single court"); ALI *Restatement (Second) of Judgments* § 61.

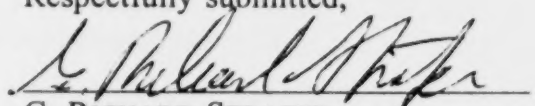
The ***absence*** of such a rule could lead to results even more absurd than those at issue in *Quintero*. Assuming, *arguendo*, that neither the Double Jeopardy Clause nor the doctrine of collateral estoppel justified the dismissal of the 13 substantive money laundering counts added by the government in ***Quintero II*** following the acquittals in ***Quintero I***, what doctrine (other than perhaps the statute of limitations) would prevent the government from bringing those counts in ***13 successive indictments*** until Quintero was convicted of something? In the instant case, application of res judicata would preclude the government's attempt to add the 13 new charges 18 months after the original indictment and 9 months after Quintero had been acquitted of the conspiracy and money laundering counts that alleged those overt acts. The fact that the jury was hung on some counts does not alter the analysis. A final judgment on the merits was reached in Count 2, the drug conspiracy count, as well as on the first object of Count 19, the money laundering conspiracy charge. These counts expressly encompassed the 169 overt acts from which the 13 "new" counts in ***Quintero II*** were derived. Moreover, had the case against Quintero been civil in nature, the district court would have been justified in either dismissing the added counts based on the doctrine of res judicata, or denying the government leave to amend the complaint

under Fed. R. Civ. P. 15. Quintero was entitled to no less protection.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,



G. RICHARD STRAFER
G. RICHARD STRAFER, P.A.
2400 South Dixie Highway
Suite 200
Miami, Florida 33133
Telephone: (305) 857-9090

UNITED STATES COURT OF APPEALS,
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee, Cross-Appellant,

v.

FRANK QUINTERO, Jr.,

Defendant-Appellant, Cross-Appellee.

No. 97-5487.

January 22, 1999, Decided

Following trial in which defendant was acquitted of some charges and jury was unable to reach verdict on others, defendant moved to dismiss superseding indictment charging him with money laundering and money laundering conspiracies. The United States District Court for the Southern District of Florida, No. 94-578-CR-EBD, Edward B. Davis, J., granted motion in part and denied it in part. Parties cross-appealed. The Court of Appeals, Dubina, Circuit Judge, held that: (1) judgement of acquittal on drug conspiracy charge did not preclude, on collateral estoppel grounds, retrial on money laundering charges; (2) acquittal by jury on charge of money laundering conspiracy under one prong of statute did not preclude, on collateral estoppel grounds, retrial on charges of money laundering and money laundering conspiracies on which jury did not reach verdict; and (3) collateral estoppel did not apply so as to preclude trial on new money laundering charges.

Affirmed in part, vacated in part, and remanded.

G. Richard Strafer, Quinon & Strafer, Miami, FL, for Defendant-Appellant, Cross-Appellee.

Anne Ruth Schultz and Adalberto Jordan, Asst. U.S. .Attys., Miami, FL, for Plaintiff-Appellee, Cross-Appellant.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT and DUBINA, Circuit Judges, and SMITH, Senior Circuit Judge.

DUBINA, Circuit Judge:

This is an appeal from an order of the district court denying defendant Frank Quintero's ("Quintero") motion to dismiss Counts 18(b), 18(c), and 19 of a third superseding indictment on the basis of collateral estoppel. The government cross-appeals the district court's order granting in part Quintero's motion to dismiss Counts 18(a), 25, 27, 30, 31, 33, and 34 of the third superseding indictment on the basis of collateral estoppel. Because the collateral estoppel doctrine implicates the constitutional protection against double jeopardy, we have jurisdiction to review this interlocutory order under *Abney v. United States, 431 U.S. 651, 659, 97 S.Ct. 2034, 52 .L.Ed.2d 651 (1977).* Having reviewed over 4,000 pages of trial transcript, jury instructions, and motions, and having the benefit of oral argument and the parties' briefs,[1] we affirm in part, and vacate in part the order of the district court.

I. BACKGROUND

A. The Second Superseding Indictment

On December 19, 1995, the government returned a second superseding indictment charging Quintero and 13 co-defendants with cocaine importation and money laundering conspiracies extending from November 1989 through March 1995.[2] According to the second superseding indictment, co-conspirators Mario I. Gonzalez ("Gonzalez"), Mario Placido Rodriguez ("Rodriguez"), Manny Sanz

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[1] In addition to the parties' briefs, we have the benefit of amicus briefs filed on behalf of the National Association of Criminal Defense Lawyers and the Florida Association of Criminal Defense Lawyers. Both organizations support Quintero's position.

[2] Quintero was not charged in the original and first superseding indictments.

("Sanz"), Jesus Llauger ("Llauger"), Pedro Garcia ("Garcia"), and others organized several large cocaine shipments from Colombia, South America, to Miami, Florida, via boat and air cargo. The indictment charged Quintero, Gonzalez, Gerardo Remy ("Remy"), Luis Sanz ("Luis") and others with forming "front" corporations and opening foreign bank accounts to launder cocaine profits. Most of the defendants pled guilty and were sentenced.[3]

Quintero, an attorney in Dade County, Florida, had represented Gonzalez, Rodriguez, and Sanz in various civil and criminal matters. In the second superseding indictment, the government charged Quintero as follows: cocaine importation conspiracy, in violation of *21 U.S.C. § 963* (Count 2); cocaine possession and distribution conspiracy, in violation of *21 U.S.C. § 846* (Count 3); money laundering conspiracy, in violation of *18 U.S.C. § 1956*(h) (Count 18); and substantive money laundering, in violation of *18 U.S.C. §§ 1956*(a)(1) and (2) (Counts 19, 21-26). Quintero proceeded to trial alone. The court provided the jury with a special verdict form which divided the money laundering conspiracy (Count 18) into three separate conspiracies. The jury acquitted Quintero of Counts 3, 18(a), 21, 22, 23, 24, 25, and 26. The jury was unable to reach a verdict as to Counts 2, 18(b), 18(c), and 19.

Following the verdict, Quintero filed a renewed motion for judgment of acquittal. In an order dated March 28, 1997, the district court granted the motion as to Count 2, the remaining drug conspiracy charge, holding that "no reasonable fact finder could conclude from the evidence that Quintero aided the conspiracy." R7-922-4. The district court explicitly based its Count 2 acquittal on a finding that the government had failed to prove Quintero's criminal intent. The district court found that the government failed to provide any evidence from which a jury could find beyond [**5] a reasonable doubt that Quintero knowingly participated in the cocaine importation conspiracy. R7-922-8.[4]

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[3] Gonzalez, after learning of the imminent indictment, fled the country and remains a fugitive

[4] The government does not appeal the district court's order granting Quintero's motion for judgment of acquittal on Count 2

B. The Third Superseding Indictment

Thus, only two charges remained pending against Quintero--the remaining subparts of the money laundering conspiracy, Counts 18(b) and (c), and one substantive charge of money laundering, Count 19. The district court set Quintero's retrial for April 9, 1997. The government filed an emergency motion to continue the trial date in order to file an appeal to this court challenging the district court's order acquitting Quintero of Count 2. During the pendency of the appeal, the government filed a third superseding indictment which included the following charges against Quintero: cocaine importation conspiracy, in violation of *21 U.S.C. § 963* (Count 2); money laundering conspiracy, in violation of *18 U.S.C. § 1956*(h) (Count 18);[5] substantive [**6] money laundering under *18 U.S.C. §§ 1956*(a)(1)(B)(i) and 2 (Counts 19, 25, 27, 30, 31, 33, and 34); substantive money laundering under *18 U.S.C. §§ 1956*(a)(1)(A)(i) and 2 (Counts 20, 24, 26, 29, 32, and 35); and substantive money laundering under *18 U.S.C. §§ 1957* and 2 (Count 28). The government then dismissed its appeal from the district court's judgment of acquittal on Count 2.

Quintero filed a motion to dismiss the third superseding indictment on the basis of double jeopardy, collateral estoppel, multiplicity, failure to state a claim, and denial of due process. The district court entered an order granting in part and denying in part Quintero's motion to dismiss. The district court dismissed Count 2, the cocaine importation conspiracy charge, as a direct violation of the double jeopardy clause. With regard to the third superseding indictment, the district court dismissed Count 28 for failure to state an offense and dismissed Count 20 as multiplicitous. The district court dismissed Counts 23-27 and 29-35, of the third superseding indictment, under the doctrine of collateral estoppel. Thus, the only remaining charges were the original mistried money laundering counts--Counts 18(b) and (c) and Count 19 (of the second superseding indictment). Quintero filed a notice of appeal challenging the district court's order denying his motion

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[5] The money laundering conspiracy was divided three ways: (a) a conspiracy to violate § 1956(a)(2)(A); (b) a conspiracy to violate § 1956(a)(2)(B)(i); and (c) a conspiracy to violate § 1957. Count 18(b) of the second superseding indictment became Counts 18(a) and 18(b) of the third superseding indictment

to dismiss Counts 18(b), 18(c), and 19 on the basis of collateral estoppel. The government filed a cross-appeal challenging the district court's order dismissing Counts 18(a) (this was a portion of Count 18(b) of the second superseding indictment, which was a charge of conspiring to violate *18 U.S.C. § 1956*(a)(2)), 25, 27, 30, 31, 33, and 34 of the third superseding indictment on the basis of collateral estoppel.

II. ISSUES

1. Whether the district court properly refused to dismiss Counts 18(b), 18(c), and 19 of the third superseding indictment on the basis of collateral estoppel.

2. Whether the district court properly dismissed Counts 18(a), 25, 27, 30, 31, 33, and 34 of the third superseding indictment on the basis of collateral estoppel.

III. STANDARD OF REVIEW

[2,3] The district court's collateral estoppel rulings are subject to de novo review by this court. *United States v. Shenberg, 89 F.3d 1461, 1478 (11th Cir.1996),* cert. denied, _____*U.S.___, 117 S.Ct. 961, 136 L. Ed. 2d 847 (1997).* The district court's factual determinations underlying its legal conclusions are to be upheld unless clearly erroneous. *Vazquez v. Metropolitan Dade County, 968 F.2d 1101, 1106 (11th Cir.1992).*

III. STANDARD OF REVIEW

[2,3] The district court's collateral estoppel rulings are subject to de novo review by this court. *United States v. Shenberg,* 89 F.3d 1461, 1478 (11th Cir.1996), *cert. denied,* ____U.S.____, 117 S.Ct. 961, 136 L.Ed2d 847 (1997). The district court's factual determinations underlying its legal conclusions are to be upheld unless clearly erroneous. *Vazquez v. Metropolitan Dade County,* 968 F.2d 1101, 1106 (11th Cir.1992).

IV. DISCUSSION

[4-7] "The doctrine of collateral estoppel is a narrow exception to the Government's right to prosecute a defendant in separate

trials for related conduct." *United States v. Brown, 983 F.2d 201, 202 (11th Cir.1993).* The doctrine applies "when an issue of ultimate fact has once been determined by a valid and final judgment." *Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970).* When determining whether collateral estoppel applies in the context of a retrial, courts must engage in a two-part inquiry. See *Shenberg, 89 F.3d at 1479.* "First, the Court must decide whether it can ascertain the basis of the acquittal at the first trial. " *United States v. Garcia, 78 F.3d 1517, 1521 (11th Cir.1996).* Second, the court must determine whether the elements of the crime upon which the prior acquittal was based are also essential elements of the crime for which the defendant is to be retried. See id. The burden of persuasion is on the defendant at both steps of the inquiry. See *Brown, 983 F.2d at 202.* As we said in Brown, "the identity of overlapping elements required for collateral estoppel must extend beyond the legal definition of the elements." *983 F.2d at 204.* There must also be such factual identity of elements that "the subsequent verdict of conviction [is] rationally inconsistent with the prior verdict of acquittal." Id. (citation omitted).

A. Counts 18(b), 18(c), and 19

Quintero contends that the district court erred in denying his motion to dismiss Counts 18(b), 18(c), and 19, because its reliance on *Shenberg, 89 F.3d 1461,* is misplaced. The government agrees that the district court's reliance on Shenberg is incorrect, but it maintains that collateral estoppel does not apply to Counts 18(b), 18(c), and 19. According to the government, under the two-pronged collateral estoppel analysis enunciated by this court in Brown, it is not barred from retrying Quintero on these counts. We agree with the government.

[8] In reaching its determination that Counts 18(b), 18(c), and 19 were not subject to dismissal, the district court applied its interpretation of Shenberg to find that "neither the Double Jeopardy Clause nor the collateral estoppel doctrine prevents the Government from retrying a defendant on mistried charges." R9-1036-4. The district court did not conduct a collateral estoppel analysis, but concluded that based on the language of Shenberg, collateral estoppel did not bar these counts from being retried. The district court's conclusion was correct, although its understanding of Shenberg was somewhat misplaced. Shenberg states that "although double jeopardy does not bar the

government from reprosecuting defendants on mistried counts, estoppel principles may nevertheless apply to preclude the government from relitigating certain issues on retrial." *89 F.3d at 1478.* Thus, an analysis under collateral estoppel principles is necessary to determine what facts, if any, were necessarily determined in the acquittal at the first trial such that those issues are not relitigated on retrial. *Brown, 983 F.2d at 202.*

In conducting a collateral estoppel review, we must examine the district court's order granting the judgment of acquittal as to the importation conspiracy and the evidence produced at the first trial. As to the judgment of acquittal on the importation conspiracy, Count 2, the district court found that while the government had established the existence of a conspiracy to import cocaine into the United States, it had failed to show that Quintero knew the essential objectives of the conspiracy and that he voluntarily participated in the importation conspiracy. The district court concluded that "no reasonable factfinder could conclude from the evidence that Quintero aided the [cocaine importation] conspiracy." R7-922-4. The district court's order also indicates that it distinguished the drug importation charge from the money laundering charges and found sufficient evidence to support Counts 18(b), 18(c), and 19. The record supports the district court's findings.

Counts 18(b), [**12] 18(c), and 19 stem from the allegation that Quintero and Remy took $300,000 of Gonzalez's drug money to Switzerland in November 1991 and opened a bank account with it. The government's evidence comes largely from the testimony of Sanz, who said that Gonzalez told him that Quintero and Remy had smuggled $300,000 of Gonzalez's drug money into Switzerland in their underwear and opened a bank account with the money. The government introduced into evidence airline tickets and credit card records which demonstrate that Quintero did travel to Switzerland with Remy. Swiss bank records also show that on that same day, Remy opened a $300,000 account and Quintero signed account documents giving him power of attorney.

In his testimony, Quintero acknowledged traveling to Switzerland, however, he stated that he went with Remy to meet a witness in an unrelated case. When the witness failed to show, he and Remy went to a bank where Remy opened the account. According to Quintero, Remy asked him to sign the power of attorney documents in

case something happened to Remy or Gonzalez. Quintero stated that he did not understand the documents because they were in French, but he took Remy's word for the contents of the documents. The only thing Quintero said he knew about the money was that it might have come from a deal Gonzalez had with a South American precious gem seller.

[10] To be convicted of conspiracy to money launder and money laundering under *18 U.S.C. § 1956*, a defendant must knowingly enter into a financial transaction with the proceeds of unlawful activity with the intent of concealing or disguising the source or ownership of the proceeds. *United States v. Tokars, 95 F.3d 1520, 1539 (11th Cir.1996)*, cert. denied, *520 U.S. 1151, 117 S. Ct. 1328, 137 L. Ed. 2d 489 (1997)* & sub. nom *Mason v. United States, 520 U.S. 1132, 117 S. Ct. 1282, 137 L. Ed. 2d 357 (1997)*. Thus, to be guilty of money laundering, Quintero would have to know or believe that the $300,000 was cocaine money.

Nothing in the district court's judgment of acquittal precludes the government, on the basis of collateral estoppel, from retrying Quintero on Counts 18(b), 18(c), and 19. In rejecting Quintero's attack against the money laundering conspiracies and substantive money laundering count on which the jury could not reach a verdict, the district court noted that the language of the two money laundering conspiracy counts was broad enough to encompass multiple acts of which the government accused Quintero, and that the opening of the Swiss bank account alone was sufficient to send the money laundering conspiracy counts to the jury. After summarizing the testimony regarding the Swiss bank account, the district court found that it was reasonable to conclude that the jury found Quintero's explanation regarding the Swiss account unbelievable, that the evidence conclusively established that Gonzalez was a cocaine importer and he and Quintero were very close friends, and that in September 1991, Quintero knew that Gonzalez's stated income did not justify his numerous assets. This is sufficient evidence to support the elements of the money laundering charges. Thus, the district court did not necessarily find any fact in entering its judgment of acquittal as to the importation conspiracy that is an essential element of Counts 18(b), 18(c), or 19.

The results of the jury's verdicts, however, present a more difficult problem. The jury returned four not guilty verdicts: (1) not

guilty of conspiracy to possess with intent to distribute cocaine; (2) not guilty of conspiring to violate § 1956(a)(1); (3) not guilty of violating § 1956(a)(1) when Remy transferred $173,302 from Gonzalez's Swiss account to his U.S. trust account on May 14, 1992; and (4) not guilty of violating § 1956(a)(1) from May 19, 1993, through May 26, 1993, when Quintero made five structured deposits, each under $10,000, into his trust and operating accounts taken from $35,000 he received for the sale of his boat to Sanz and Rodriguez. The jury was unable to reach a verdict on four counts: conspiracy to import cocaine; conspiracy to violate § 1956(a)(2); conspiracy to violate § 1957; and the substantive § 1956(a)(1) count involving the deposit of $300,000 in drug proceeds into a Swiss bank account.

The district court found that the jury acquitted Quintero because he did not have the requisite criminal intent. R9-1036. If a lack of intent had been the reason for Quintero's acquittals, though, the jury should also have acquitted him of the substantive money laundering charge (Count 19). It did not. Instead, the jury hung on Count 19. The district court's finding is therefore clearly erroneous. We agree, however, with the district court's ultimate conclusion that collateral estoppel does not apply to counts 18(b), 18(c), and 19.

Since the jury did not acquit Quintero of the substantive money laundering count involving the transportation of the money to Switzerland (Count 19), the jury must have based its acquittal on the § 1956(a)(1) conspiracy charge (Count 18(a)) on the government's failure to prove that Quintero knowingly entered into an agreement to violate § 1956(a)(1) as charged in the second superseding indictment. This is the only logical conclusion which reconciles the jury's acquittal on Count 18(a) with the jury's failure to reach a verdict on Count 19.

The jury instructions also support the conclusion that the jury must have determined that Quintero did not join the § 1956(a)(1) conspiracy. The district court instructed the jury that in order to find Quintero guilty of the § 1956(a)(1) conspiracy, it had to find that two or more persons agreed to violate § 1956(a)(1), that Quintero joined the conspiracy, and that one of the conspirators committed an overt act in furtherance of the conspiracy. Moreover, the district court instructed the jury that mere association with others, mere presence at a transaction, and the discussion of common aims and interests did not necessarily

establish a conspiracy. R5-761-13-14. The district court also instructed the jury on the elements of a substantive § 1956(a)(1) violation as part of the § 1956(a)(1) conspiracy instruction. R5-761-17-18.

The district court clearly instructed the jury that a conspiracy to violate § 1956(a)(1) was separate and distinct from the substantive § 1956(a)(1) violations charged in the second superseding indictment. The jury was also instructed that an agreement to violate § 1956(a)(1) was different from an agreement to violate § 1956(a)(2) or § 1957. Thus, the jury had to conclude that Quintero did not agree to participate in the § 1956(a)(1) conspiracy. This conclusion does not bar the government from retrying Quintero on Count 19 because the agreement to violate § 1956(a)(1) is not an "ultimate fact" in Count 19. See *Shenberg, 89 F.3d at 1479-81.* Similarly, an agreement to violate § 1956(a)(1) is not an "ultimate fact" or element of a conspiracy to violate § 1956(a)(2) or § 1957. Therefore, the fact that the jury concluded that Quintero did not conspire to violate § 1956(a)(1) does not bar the government from retrying Quintero on the counts on which the jury failed to agree. Accordingly, collateral estoppel does not apply and the district court properly denied Quintero's motion to dismiss counts 18(b), 18(c), and 19 on this basis.

B. Counts 18(a), 25, 27, 30, 31, 33, and 34

The government cross-appeals the portion of the district court's order that grants Quintero's motion to dismiss Count 18(a) (§ 1956(a)(2)(A) money laundering conspiracy), and the substantive money laundering Counts 25 ($24,917 from Swiss bank account used to pay Quintero's June 1, 1992, loan to London Insurance), 27 ($25,000 from Swiss bank account paid to Quintero's personal account), 30, 31, 33 (March 16, May 6, and June 7, 1994, rent payments for Rodriguez), and 34 (July 6, 1994, boat storage fee) of the third superseding indictment on the basis of collateral estoppel.[6] In its order, the district court based its ruling on several findings: (1) the judgment of acquittal on the cocaine importation conspiracy was based on the failure of the government to

[6] The government elected not to appeal the dismissal of Count 20 on the basis of multiplicity, the dismissal of Counts 24, 26, 29, 32, and 35 on the basis of collateral estoppel, or the dismissal of Count 28 for failure to state an offense.

prove Quintero's knowing participation in the drug conspiracy; (2) the jury must have acquitted Quintero on the money laundering conspiracy because it found he did not intend [**19] to participate in a conspiracy; (3) all of Quintero's acquittals "were based on lack of intent to break the law;" and (4) Counts 18(a), 23-27, and 29-35 required the government to prove that Quintero intended to break the law when committing the acts in question. The district court noted that "since intent to [*838] violate the law is an essential element of conviction on Counts 18(a), 23-27, and 29-35, and the acts are the same as those acquitted in the first trial, as in [United States v. Garcia,] *78 F.3d 1517 (11th Cir.1996)*, the Court finds that collateral estoppel bars the Government from prosecuting Quintero on those charges." R9-1036-4-8.

In analyzing these remaining counts under collateral estoppel principles, we reiterate our previous finding that the district court's determination that the jury necessarily decided that Quintero lacked the criminal intent to break the law when he committed the acts charged in the second superseding indictment is clearly erroneous. If this were true, then carried to its logical conclusion, it would mean that the jury would have had to find Quintero not guilty of all the counts charged. It did not do so. After reviewing the district court's ruling on Quintero's motion for judgment of acquittal and the evidence presented at the trial, we conclude that the jury must have determined that Quintero did not knowingly join in the § 1956(a)(1) conspiracy.

In performing a collateral estoppel review, it is necessary for us to identify the facts and issues of each count. Count 18(a), the conspiracy to violate § 1956(a)(2)(A), was charged in the second superseding indictment as part of Count 18(b). Quintero was not acquitted of this charge. The district court instructed the jury that in order to find Quintero guilty of Count 18(a), the government had to prove that there was an agreement to violate § 1956(a)(2)(A), that Quintero joined in the agreement, and that one of the parties to the agreement committed an overt act described in the indictment in an effort to accomplish an object of the conspiracy. The district court also instructed the jury that in order to prove a violation of § 1956(a)(2)(A), the government had to present evidence showing that monetary instruments were transported from the United States to a place outside the United States, or from a place outside the United States to a place inside the United States; that Quintero knew that the monetary

instruments were drug proceeds; and that he willfully conducted the financial transaction with the intent to promote the carrying on of the specified unlawful activity.

Counts 25, 27, 30, 31, 33, and 34 are substantive money laundering counts--violations of *18 U.S.C. §§ 1956*(a)(1)(B)(i) and 2. Counts 25 and 27 involve disbursements of funds from the Swiss bank account to Quintero on June 17, 1992, and June 26, 1992, respectively. Quintero's bank credited the $24,917 involved in Count 25 to his line of credit from which he had drawn a $25,000 advance on June 1, 1992. Quintero then drafted a check from the line of credit and made the check payable to London Insurance. The bank then deposited $25,000 from the June 26, 1992, disbursement of funds from the Swiss bank account into Quintero's personal account in the U.S.

Counts 30, 31, and 33 involve the payment of Rodriguez's rent on March 16, May 6, and June 7, 1994. The evidence shows that after Rodriguez's arrest on money laundering and narcotics charges, Rodriguez instructed his wife to give cash to Quintero which Quintero, in turn, converted through his trust account to checks with which he paid Rodriguez's rent. After the police searched his office, Quintero stopped paying the Rodriguezes' rent. Quintero testified that he wrote the rent checks, but that he did not know that the cash he deposited into his account was derived from illegal drug activity.

Count 34 involves the July 6, 1994, payment of boat storage fees for Rodriguez. Rodriguez and his wife testified that Mrs. Rodriguez gave Quintero $1,600 in cash and he would then write a check to pay storage fees on Rodriguez's boat. Quintero denied paying any storage fees for the boat and the individual with whom Rodriguez's boat was stored denied that Quintero paid him any money for storage fees.

The government did not charge Counts 25, 27, 30, 31, and 33 as substantive § 1956(a)(1) counts in the second superseding indictment. The government charged these counts as overt acts in support of the § 1956(a)(1) money laundering conspiracy of which the jury acquitted Quintero. The government did not charge Count 34 as an overt act, but testimony concerning Count 34 was admitted at trial. Thus, there was no issue or fact in these added counts which was necessarily decided in Quintero's favor in the first trial.

Although counts 25 and 27 involve money transferred from the Swiss bank account, the acquittal on count 21 (which also involved the money transfer from the Swiss bank account) does not bar the government from retrying Quintero on counts 25 and 27. Quintero argued that he was not involved in the transfer of money from the Swiss bank account to Remy's trust account. The evidence showed that it was Remy, not Quintero, who requested that the money be transferred from the Swiss bank account. But the fact that the government did not prove that Quintero conducted the financial transaction does not preclude it from trying Quintero for the subsequent financial transactions involving deposits from the Swiss account to his personal bank account and using $25,000 to pay off a line of credit. The government presented direct and documentary evidence showing Quintero's involvement with those transactions. Thus, the acquittal on count 21 does not resolve an ultimate issue in counts 25 and 27.

Additionally, the jury's determination that Quintero did not agree to participate in the § 1956(a)(1) conspiracy does not bar the government from trying Quintero on the substantive § 1956(a)(1) offenses charged in counts 25, 27, 30, 31, 33, and 34 of the third superseding indictment because the agreement to violate § 1956(a)(1) is not an ultimate fact in these counts. Similarly, an agreement to violate § 1956(a)(1) is not an ultimate fact or element of a conspiracy to violate § 1956(a)(2)(A). Accordingly, collateral estoppel does not apply to these counts.

Based on our review of the record and our application of collateral estoppel principles, we affirm that part of the district court's order refusing to dismiss Counts 18(b), 18(c), and 19 of the third superseding indictment. However, we vacate that part of the order dismissing Counts 18(a), 25, 27, 30, 31, 33, and 34 of the third superseding indictment and remand this case for further proceedings consistent with this opinion.

AFFIRMED in part, VACATED in part, and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 97-5487

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

v.
FRANK QUINTERO, JR.,

Defendant-Appellant
Cross-Appellee.

On Appeal From the United States District Court
For the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19___, ____F.2d_____).

Before: TJOFLAT and DUBINA, Circuit Judges, and SMITH*, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE

*Hon. Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANK QUINTERO, JR., et al.,

Defendants.
_____/

Case No. 94-0578
CR-DAVIS

OMNIBUS ORDER

THIS MATTER is before the Court on several motions filed by Defendant Frank Quintero Jr.: Defendant's Omnibus Motion to Dismiss the Third Superseding Indictment (D.E. #1012); Defendant's Motion to File Overlong Motion (D.E. # 1011); Defendant's Motion for Severance (D.E. # 1010); Defendant's Motion to Suppress Swiss Deposition (D.E. # 1009); Defendant's Motion to Unseal Grand Jury Pleadings and Government's In Camera Submission (D.E. # 1008); Defendant's Motion to Compel Disclosure of Awards and Benefits Bestowed upon Swiss Magistrate (D.E., # 1007); Defendant's Motion for Limited Disclosure of Grand Jury Transcripts (D.E. # 1006); and Defendant's Motion to Dismiss the Third Superseding Indictment for Grand Jury Abuse (D.E. # 1005). Having thoroughly reviewed the motions, the responses, and the lengthy record in this case, the Court enters the following order granting some of the motions and denying others.

FACTUAL AND PROCEDURAL BACKGROUND

The Second Superseding Indictment, returned on December 19, 1995, charged Quintero and thirteen others with a massive cocaine importation and money laundering conspiracy extending from November 1989 through March 1995. According to the indictment and evidence at

Quintero's trial, co-conspirators Mario I. Gonzalez, Mario Placido Rodriguez, Manny Sanz, Jesus Llauger, and Pedro Garcia organized and supervised several large cocaine shipments from Colombia to Miami via boat and air cargo. The indictment charged Quintero, Gonzalez, Gerardo Remy, Luis Sanz and others with forming "front" corporations and opening foreign bank accounts to launder the cocaine profits. Most of the defendants eventually pleaded guilty and were sentenced.

Quintero, an attorney in Dade County, had represented some of the defendants on previous charges and was socially acquainted with others. The indictment charged him with twelve counts of conspiracy to import and distribute cocaine, conspiracy to money launder, and money laundering. The specific acts with which the government charged Quintero involved forming front corporations, opening a Swiss bank account and then transferring money back to co-conspirators in the United States, selling a boat knowing it was to be used to import cocaine, harboring a fugitive (Rodriguez), and helping Manny Sanz stay out of prison so he could import cocaine. Following a four-week trial in July and August of 1996, a jury acquitted Quintero of eight of the twelve counts against him.[1] The Court declared a mistrial on the other four counts after the jury failed to reach a verdict.

Following the trial, Quintero renewed his motion for judgment of acquittal on the four mistried charges. On March 28, 1997, this Court entered an order acquitting Quintero on the charge of conspiracy to import cocaine. However, the Court denied the motion as to the remaining three charges – one count of conspiracy to money launder and two substantive money laundering counts.

Retrial on the three remaining mistried charges was set for April 9, 1997. On March 30, the Government filed an emergency motion to continue the trial while it considered appealing the Court's March 28 Order of Acquittal. The Court postponed the trial, and on April 25, 1997, the Government filed its notice of appeal. On June 4, however, the

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[1] The jury voted 12-0 to acquit Quintero on two counts, after which Quintero and the Government agreed to accept an 11-1 verdict on the remaining charges. The jury voted 11-1 to acquit Quintero on another six counts.

Government moved to dismiss its appeal, and the Eleventh Circuit granted the motion on August 1.

In the interim, on May 16, 1997, the grand jury returned a Third Superseding Indictment against Quintero and other codefendants. In addition to the three mistried charges, the latest indictment charges Quintero with sixteen new counts – one each of conspiracy to import cocaine and conspiracy to money launder, and fourteen substantive money laundering counts. The latter fourteen charges stem from acts that also formed the basis of the conspiracy counts of which a jury and this Court acquitted Quintero after the 1996 trial.

DISCUSSION

THE OMNIBUS MOTION TO DISMISS THE THIRD SUPERSEDING INDICTMENT

Quintero argues that the May 16 indictment should be dismissed for several reasons: (1) it is impermissibly vindictive; (2) it violates the Double Jeopardy and Due Process Clauses of the Constitution; (3) the doctrine of collateral estoppel bars Counts 18(b) and (c), 19, 10, and 23-35; (4) Counts 19-20, 23-24, and 25-26 are multiplicitous; (5) Count 28 is duplicitous, fails to state an offense and is barred by the Double Jeopardy Clause; and (6) Counts 29-32 and 34-35 violate the Due Process Clause because the Government delayed bringing them. For the reasons stated below, the Court will dismiss (a) Count 2 on double jeopardy grounds;[2] (b) Counts 18(a), 23-27, and 29-35 on collateral estoppel grounds; (c) Count 20 as multiplicitous; and (d) Count 28 for failing to state an offense. The Court will deny Quintero's motion to dismiss on all other grounds, and let stand for retrial Counts 18(b), (c), and 19.

A. Collateral Estoppel

Quintero argues that the doctrine of collateral estoppel bars

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[2] Count 2 charges Quintero with conspiracy to import cocaine and is identical to the charge of which the Court acquitted Quintero in its March 28 order. The Government has conceded this and agrees that the Court should dismiss Count II. *See* Government Response at 3 n.1.

Counts 18(b) and (c), 19, 20, and 23-35. As to Counts 18(b) and (c), 19, and 20, those charges are based on the identical conduct that formed the basis of the three charges that resulted in a hung jury last year. Neither the Double Jeopardy Clause nor the collateral estoppel doctrine prevents the Government from retrying a defendant on mistried charges. *United States v. Shenberg*, 89 f.3D 1461, 1478 (11TH Cir. 1996); *cert. Denied sub nom. Sepe v. United States*, 117 S. Ct. 961 (1997); *United States v. Bailin*, 977 F.2d 270, 276 (7th Cir. 1992). Therefore, collateral estoppel does not bar those counts.

However, Quintero's argument that the doctrine bars Counts 23-27 and 29-35 is correct.[3] In addition, the Court finds that the doctrine mandates dismissal of Count 18(a). In the context of subsequent prosecutions for related conduct, collateral estoppel applies when a fact or issue necessarily determined in the defendant's favor in the first trial is an essential element of conviction in the second trial. *United States v. Garcia*, 78 F.3d 1517, 1521 (11th Cir. 1996). The Eleventh Circuit has developed a two part test for determining whether collateral estoppel applies in a criminal retrial. *Shenberg*, 89 F.2d at 1479; *Garcia*, 78 F.2d at 1521. First, the Court must examine the original verdict and record to determine what facts, if any, were necessarily decided in a first-trial acquittal. *Id.* If there were facts necessarily decided, the Court then must determine whether those facts constitute an essential element of the subsequent charges. *Id.* If so, collateral estoppel bars the second prosecution.

The *Garcia* case presents an excellent example of how this exercise works. In that case, the Government charged Garcia with conspiracies to import and distribute cocaine. The court granted a judgment of acquittal, finding that the Government had failed to prove that Garcia knowingly participated in the conspiracy. *Garcia*, 78 F.3d at 1519. Four years later, the United States charged Garcia with a substantive violation of the Travel Act[4] for allegedly providing the same cocaine traffickers with a boat during the original conspiracy, of which he had been acquitted. An essential element of the second charge was that

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[3] As noted *infra*, the Court is dismissing Count 28 on alternate grounds.

[4] 18 U.S.C. § 1952.

Garcia acted with the intent to promote or facilitate the same drug activity that led to the first charges. *Id.* At 1519-20.

The Eleventh Circuit first determined that "the district court's judgment of acquittal [in the conspiracy trial] established for all time Garcia's lack of knowing involvement in the cocaine conspiracy, and his lack of intent to break the law in connection with that conspiracy . . . . *Id.* At 1521. Then the appellate panel determined that the fact decided in the first case – lack of interest – barred prosecution of the second charge because intent to break the law was also an essential element of conviction on that charge. *Id.* At 1522.

The instant case presents almost the same scenario as *Garcia*. Quintero was acquitted of conspiracy charges in his first trial, and now is charged with a new count of conspiracy to money launder, as well as substantive money laundering counts. The new conspiracy count, 18(a), appears to charge the same acts as the acquitted money laundering conspiracy count, only under a different statutory subsection. All of the acts described in the new substantive money laundering charges, Counts 23-27 and 29-35, were among the acts that formed the basis of the acquitted cocaine and money laundering conspiracy charges.[5]

As in *Garcia*, the Court must decide what facts, if any, were determined in the acquittals. The task is simple with regard to the cocaine conspiracy charge. In granting Quintero's renewed motion for judgment of acquittal on that count following the trial, the Court specifically found that the Government had failed to prove the intent element necessary to convict on a conspiracy charge: "the Government failed to adduce one concrete piece of evidence at trial from which a jury could find beyond a reasonable doubt that Quintero knowingly participated in the cocaine conspiracy of his friends and clients." Order of March 28, 1997, at 8.

A jury acquitted Quintero on the relevant money laundering conspiracy charge, making the Court's job slightly more difficult. But a

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[5] The acts described in Counts 23-27 and 29-35 either were listed as over acts in the Second Superseding Indictment or introduced into evidence during the 1996 trial.

review of the evidence presented at trial shows that the jury could only have acquitted Quintero for the same reason the Court acquitted him on the cocaine count – lack of intent to participate in a conspiracy. There was overwhelming physical and testimonial evidence that Quintero committed the acts that formed the basis of the government's charges (i.e., making the bank deposits, selling the boats), and Quintero never denied undertaking them. No rational juror could have acquitted Quintero on the basis that he did not do these things. The jury had to acquit Quintero on the grounds that he did not undertake the acts with the intent of furthering a money laundering conspiracy.[6]

Having found that Quintero's acquittals were based on lack of intent to break the law, the Court next must examine whether intent to violate the law is an essential element of conviction on Counts 18(a), 23-27, and 29-35. The Government charges that the acts in question violated 18 U.S.C. § 1956(a)(1)(A)(i), 1956 (a)(1)(B)(i), or 1956(a)(2)(A).

The first subsection requires that the defendant conduct certain activity "with the intent to promote the carrying on of *specified unlawful activity.*" 18 U.S.C. §1956(a)(1)(B)(i)(emphasis added). The third requires that the defendant transport or transfer funds in or out of the United States *with the intent to promote the carrying on of specified unlawful activity.* 18 U.S.C. § 1956(a)(2)(A).

In short, all three subsections require the Government to prove intent to act illegally. But as in *Garcia,* the acquittals in the first trial established for all time Quintero's lack of intent to break the law while committing the acts in question. Since intent to violate the law is an essential element of conviction on Counts 18(a), 23-27, and 29-35, and the acts are the same as those acquitted in the first trial, as in *Garcia* the Court

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[6] The government argues that the Court already determined that it could not decide why the jury acquitted Quintero on the money laundering conspiracy charge in a March 28 order denying Quintero's Motion to Bar Use of Acquitted Conduct in Retrial. However, the precise issue was not before the Court at that time, and so even though the Court discussed the evidence presented at the first trial, it did not decide the issue. It only determined that the Government could present evidence of acquitted conspiracy conduct to prove substantive counts at the second trial, a ruling not at odds with the current decision.

finds that collateral estoppel bars the Government from prosecuting Quintero on those charges. Therefore, the Court will dismiss those counts on from the Third Superseding Indictment on collateral estoppel grounds.[7]

B. Count 20 is Multiplicitous

An indictment is multiplicitous if it charges a single offense in more than one count. *United States v. Howard*, 918 F.2d 1529 (11th Cir. 1990), *cert denied*, 500 U.S. 943 (1991). In counts 19 and 20 of the Third Superseding Indictment, the Government has done exactly that. Both counts concern a trip that Quintero made to Lausanne, Switerzerland from November 6-8, 1991, with co-defendant Gerardo Remy. The Government alleges that Quintero and Remy deposited $300,000 of co-defendant Mario Gonzalez's cocaine money in a lausanne bank. In Count 19, the Government asserts this conduct violated 18 U.S.C. § 1956(a)(1)(B)(I). In Count 20 the Government asserts this conduct violated 18 U.S.C. § 1956(a)(1)(A)(I).

The multiplicity doctrine is based on the Double Jeopardy Clause of the Fifth Amendment to the Constitution, which "assures that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Thus, the test for determining if an indictment is multiplicitous is whether Congress authorized or intended to authorize separate punishments for the conduct in question. *United States v. Holmes*, 44 F.3d 1150, 1154 (2d Cir. 1995); *United States v. Fiore*, 821 F.2d 127, 130 (2d Cir. 1987).

In detecting this issue, the Court should examine the two statutes or subsections involved to determine whether they are sufficiently distinguishable from one another to justify separate punishments. *Fiore*,

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[7]The Government argues that *Shenberg* compels a different result, and both parties seem to think that *Shenberg* and *Garcia* are inconsistent. Both propositions are wrong. Both cases use the two-part collateral estoppel test developed by the Eleventh Circuit in *United States v. Brown*, 963 F.2d 201 (11th Cir. 1993). The two courts reached different results because the factual and procedural circumstance of the case were different. As the Court has explained, the instant factual situation mirrors *Garcia*, not *Shenberg*

821 F.2d at 130. This latter determination is nothing more than the *Blockburger* double jeopardy test: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

When viewing the statute, it is clear that Congress did not authorize separate punishments for violations of subsections 1956(a)(1)(A)(I) and (a)(1)(B)(I). Subsection (a)(1) as a whole prohibits conducting a financial transaction for certain specified unlawful purposes. 18 U.S.C. § 1956(a)(1). The person must know that the transaction involves proceeds of the specified unlawful activity at the time of the transaction. *Id.* Under subsection 1956(a)(1)(A)(I), the person must also intend to promote the carrying on of the specified unlawful activity. Under subsection 1956(a)(1)(A)(I), the person must know that the transaction is designed to conceal or disguise the nature, location, source, ownership or control of the proceeds in question.

Thus, the only difference between the two subsections is the improper purpose for which the defendant makes the transaction. The conduct prohibited – conducting certain financial transactions with guilty knowledge – is the same under (a)(1)(A)(I) as under (a)(1)(B)(I). "Having knowledge of two improper purposes rather than one does not multiply the offense of a single financial transaction into two offenses." *Holmes*, 44 F.3d at 1155 (government could not charge defendant with two counts for violating subsection 1956(a)(1)(B)(I) and subsection 1956(a)(1)(B)(ii) when the only difference between the subsections was the improper purpose for which the defendant made the transaction). *Holmes* is directly applicable to this case. The fact that Quintero allegedly had more than one unlawful purpose in mind when he deposited the money in Switzerland does not mean he committed two crimes.[8]

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[8] A good analogy is murder. A defendant who kills the same peson both with premeditation and while committing a robbery cannot be found guilty of two counts of first-degree murder just because there were two unlawful reasons. There still was only one crime.

The language of subsection 1956(a)(1) supports this conclusion.[9] By placing the punishment at the end of the entire subsection, Congress authorized one punishment for a defendant who violates the subsection for any one of several reasons. It did not place punishment language after each paragraph, thereby indicating its intent to punish defendants separately for violating each paragraph. Finally, the *Blockburger* test does not compel any different result. As outlined above, paragraphs (a)(1)(A)(I) and (a)(1)(B)(I) punish the same unlawful activity. Therefore, each paragraph does not require proof of an element that the other does not.

Count 19 of the Third Superseding Indictment, which alleges a violation of subsection 1956(a)(1)(B)(I), is the same charge as Count 19 of the Second Superseding Indictment, which the jury in the first trial mistried. As Count 20 of the Third Superseding Indictment alleges a separate charge for the same offense, it is multiplicitous. Accordingly, the Court will dismiss Count 20.

C. Count 28 Fails to State an Offense

The Government alleges in Count 28 that Quintero violated 18 U.S.C. § 1957 – engaging "in a monetary transaction in criminally derived property that is of a value greater than $10,000" – by depositing $34,200 in cash from cocaine deals into his professional trust account. However, the "monetary transaction" was actually five separate deposits made over

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[9] Subsection 1956(a)(1) reads in pertinent part:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the transaction is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the process of specified unlawful activity;

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

the course of a week. Each deposit was for less than $10,000. To meet the statutory $10,000 requirement, the Government has aggregated the five deposits and contends that they represent one "monetary transaction."

Both the Eleventh Circuit and other courts have rejected identical attempts by prosecutors to meet the statutory minimum. In *United States v. Jenkins*, 58 F.3d 611 (11th Cir. 1995), the court held that it is unclear from the statutory language whether Section 1957 "applies only to single transactions exceeding $10,000 or includes a series of transactions that total more than $10,000 – *Id* at 613. In the face of that ambiguity, the court held that it was bound to construe the statute narrowly and apply it only to single transactions of $10,000 or more. *Id.*

The Ninth Circuit came to a similar conclusion in *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997). The court wrote that the statute could be frustrated "if criminal deposits have been kept under $10,000. But that is the way the statute is written, to catch only large transfers." *Id.* at 1292. This Court agrees that the statutory language compels a finding that it applies only to single transactions of $10,000 or more. Following *Jenkins*, the Court finds that the Government may not aggregate five separate transactions of less than $10,000 and allege a violation of Section 1957. Therefore, the Court will dismiss Count 20 for failing to state an offense.

The Remaining Grounds

Quintero's argument that Counts 29-32 and 34-35 violate the Due Process Clause because of the Government's delay in bringing them is moot, as the Court has dismissed those counts on alternate grounds. As to his arguments that the indictment is impermissibly vindictive and violates the Due Process Clause of the Constitution, the Court has thoroughly reviewed them and finds them to be without merit. Accordingly, the Court will not dismiss the Third Superseding Indictment on those grounds.

II. THE MOTION TO SEVER

Quintero argues that the Government orchestrated a frivolous appeal of this Court's March 28 Order of Acquittal so that it could retry

him with codefendant Pedro Garcia. The Court finds both parties' accusations and arguments on this subject irrelevant to whether it should sever the Defendants. The only legal justification Quintero offers for severing the two defendants is the same argument that Court previously heard and rejected. The Court again finds that this is not a case where so-called "spillover" harm mandates severance. Of the three counts now remaining against Quintero, Garcia is charged in two – Counts 18(b) and (c). In addition, the Court has already ruled that the Government may use evidence of Quintero's knowledge of the drug-dealing activities of his co-conspirators as proof that he conspired to launder money.

Thus, evidence presented against Quintero and Garcia is likely to be similar and relevant to the Government's case against both. Where evidence against multiple defendants in a conspiracy is based on similar facts and testimony, the Court should try the defendants together, rather than separately, even if much of the evidence is directed at a specific coconspirator. *United States v. Freyre-lazaro*, 3 F. 3d 1496, 1501 (11th Cir. 1993),*cert. denied sub nom. Llerena-Acosta v. United States*, 511 U.S. 1011 (1994). Therefore, the Court will deny Quintero's motion to sever.

III. THE MOTION TO SUPPRESS THE SWISS DEPOSITION

Quintero argues that the Court should suppress the deposition of Pierre Iseli, taken in Switzerland on April 2, 1997, for several reasons: (1) the Government improperly used it in grand jury proceedings prior to the reindictment of Quintero and several co-defendants; (2) the procedures used in the deposition violate Quintero's Sixth Amendment right to confront witnesses against him (3) the deposition is inadmissible under Federal Rule of Evidence 406; and (4) the Government has failed to establish Mr. Iseli's unavailability.

Iseli was the bank officer in charge of corporate accounts at Banque Suisse Italienne (BSI), the bank where Quintero is accused of depositing $300,000 of co-defendant Mario Gonzalez's drug profits in November 1991. At the 1996 trial, Quintero testified that co-defendant Remy actually opened the account, and that all he (Quintero) did was sign a document in French that he did not understand giving him power

of attorney over the account. Iseli testified at the deposition that he had never met Quintero and was not present during any conversations between bank manager Oliver Rufli and Quintero.[10] But he testified that the bank's routine business practice included explaining the content and effect of all documents to signatories in their "mother tongue." Ex. A to Quintero's Motion to Suppress.

A. Use of the Deposition in the Grand Jury

As to the first ground, Quintero has not offered any evidence to support the assertion that the Government used the deposition in grand jury proceedings. Even if the Government did so, Quintero has not offered any authority standing for the proposition that the Government may not use a legally obtained deposition in grand jury proceedings. Accordingly, the Court denies the motion to suppress on the grounds that the Government improperly used the deposition in the grand jury.

B. Procedures Used in the Deposition

As to the second ground, Quintero contends that the deposition procedures were inherently unreliable, primarily because the Swiss magistrate who presided over the deposition had previously worked in a prosecutorial capacity on an unrelated case with Assistant United States Attorney Paul Pelletier. While that arrangement gives the Court some cause for concern and requires a close examination of the record, it does not, as Quintero argues, makes the deposition *per se* unreliable.

For the Court to find that admitting the deposition would violate Quintero's Confrontation Clause rights, he must show that the procedures used at the deposition "were so incompatible with our fundamental principles of fairness or so inaccuracy or bias as to render the testimony inherently unreliable." *United States v. Sturman*, 951 F 2d 1466, 1480 (6th Cir.1991); *citing United States v. Salim*, 855 F .2d 944, 953 (2d Cir. 1988). Quintero has not made such a showing.

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[10] Rufli is now deceased, which is why the government sought and received Court approval to depose Iseli.

Quintero argues that he was prejudiced because (1) there was no verbatim transcription of the deposition,[11] and (2) after the magistrate posed a question, the witness was allowed to have discussions in French with the magistrate before answering in English. Quintero has failed to show how he was prejudiced. For example, he has not argued that the magistrate refused to ask any follow-up questions his lawyers submitted in writing, or that the procedures prevented him from posing any follow-up questions. Nor has he indicated how, or even if, the fact that Iseli and the magistrate had discussions after the magistrate asked question affected Iseli's answers. Instead, Quintero has attempted to insinuate improper conduct by virtue of the magistrate's prior working relationship with Pelletier. This is an insufficient showing of prejudice.

The Court also notes that the *Sturman* court held in very similar circumstances that use of a Swiss deposition in a criminal trial did not violate the defendant's Confrontation Clause rights. *Sturman,* 951 F .2d at 1480-81. The Court finds that in this case, the procedures used did not violate Quintero's constitutional right to confront witness.

C. Admissibility of the Deposition

As to the third ground, the Court will defer ruling on whether the deposition is admissible at trial until (1) the Government offers it in evidence; (2) the Government states its reason for offering it; and (3) Quintero objects and offers reasons why the deposition is inadmissible. Until that time, it is impossible for the Court to rule on its admissibility. The Court notes, though, that many of the grounds Quintero cites as reasons for excluding the deposition go not to its admissibility, but to its weight and credibility once it is received in evidence.

D. Unavailability of the Witness

As to the fourth ground, the Court extensively reviewed the procedures the Government must use to secure the presence of a Swiss witness in the United States in its March order allowing the Government to depose Iseli. Rather than repeat itself, the Court refers both parties to that order.

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[11] Swiss law forbids verbatim transcriptions of depositions.

To summarize, as a foreign citizen located outside the United States, Iseli is beyond the Court's subpoena power. Under a mutual assistance treaty between the two countries, the United States can request that the Swiss government ask Iseli to travel here to testify. But the treaty provides no means by which the Swiss government can mandate a witness' appearance in this country. It states that the government can force Iseli to come here only it Swiss law mandates it. And neither party has presented evidence showing that Swiss law compels prospective witnesses in foreign criminal cases to travel to the foreign country to testify.

Although the Government has not specifically requested that the Swiss government ask Iseli to come to the United States, Iseli unequivocally told the Swiss magistrate conducting the deposition that he does not want to travel here to testify. It would be a waste of time in this instance to require the Government to undertake a formality that it knows in advance will be futile, because there is no apparent mechanism by which the Swiss government can force Iseli to change his mind. Accordingly, the Court finds that Iseli is unavailable within the meaning of Federal Rule of Evidence 804(a) and Federal Rule of Criminal Procedure 15(e) as a witness for the upcoming trial.

E. The Motion to Compel Disclosure of Awards and Benefits

This motion is closely related to the motion to suppress. Quintero contends he needs information on awards and benefits that the United States *may* have provided to the Swiss magistrate as proof that the Iseli deposition procedures were tainted. However, as the Court previously explained, the magistrate's status alone does not prove that the deposition proceedings prejudiced him. Any order compelling disclosure of the details of any prior working relationship between the magistrate and the Government would not change that conclusion. Therefore, the Court will deny the motion.

IV. THE THREE REMAINING MOTION

Quintero has moved to (1) unseal grand jury pleadings and a

prior Government in camera submission; (2) require the government to disclosure certain grand jury transcript; and (3) dismiss the Third Superseding Indictment for grand jury abuse. The two former motions are attempts by Quintero to obtain evidence in support of the third motion. The Court has reviewed the record and finds all three motions without adequate factual support and legal justification. There is not sufficient evidence of grand jury abuse to justify dismissing the indictment.

CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendant's Omnibus Motion to Dismiss the Third Superseding Indictment (D.E.# 1012) is **GRANTED** in part and **DENIED** in part. Counts 2, 18(a), 20, and 23-35 are dismissed against Quintero. Counts 18(b), 18(c), 19 remain pending. It is

FURTHER ORDERED AND ADJUDGED that Defendant's Motion to File Overlong Motion (D.E. # 1011) is **GRANTED**. It is

FURTHER ORDERED AND ADJUDGED that Defendant's Motion for Severance (D.E. # 1010); Defendant's Motion to Suppress Swiss Deposition (D.E. # 1009); Defendant's Motion to Unseal Grand Jury Pleadings and Government's In Camera Submission (D.E. # 1008); Defendant's motion to Compel Disclosure of Awards and Benefits Bestowed upon Swiss Magistrate (D.E. # 1007); Defendant's motion for Limited Disclosure of Grand Jury Transcripts (D.E. # 1006); and Defendant's Motion to Dismiss the Third Superseding Indictment for Grand Jury Abuse (D.E. # 1005) are all **DENIED.**

DONE AND ORDERED in Chambers in Miami, Florida, this 29th day of August, 1997.

EDWARD B. DAVIS
CHIEF UNITED STATES DISTRICT JUDGE

Copy Paul Pelletier, AUSA
Robert Senior, AUSA
Robert Josefsberg
G. Richard Strafer
L. Mark Dachs

Supreme Court, U.S.
FILED
OCT 1 1999
OFFICE OF THE CLERK

No. 99-39

In the Supreme Court of the United States

FRANK QUINTERO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, in applying the collateral estoppel principle of double jeopardy analysis, a court seeking to identify the basis for the jury's acquittal on one count may draw inferences from the jury's inability to agree on a verdict on another count containing the same element.

2. Whether, consistent with the Constitution and res judicata principles, when a jury is unable to reach a verdict on particular counts, the government may obtain a superseding indictment that adds new counts that arise out of the same criminal conduct.

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In the Supreme Court of the United States

No. 99-39

FRANK QUINTERO, JR., PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 165 F.3d 831. The opinion of the district court (Pet. App. C1-C16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1999. A petition for rehearing was denied on April 2, 1999 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on July 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the Southern District of Florida returned a third superseding indictment charging petitioner with conspiracy to import cocaine, in

violation of 21 U.S.C. 963; conspiracy to engage in money laundering, in violation of 18 U.S.C. 1956(h); eight counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); six counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); and one count of money laundering, in violation of 18 U.S.C. 1957. Petitioner moved to dismiss the indictment on the ground, *inter alia*, that the collateral estoppel aspect of the Fifth Amendment's Double Jeopardy Clause barred the prosecution. The district court granted the motion in part and denied it in part. Pet. App. C1-C15. On cross-appeals by petitioner and the government, the court of appeals affirmed in part, vacated in part, and remanded for further proceedings. *Id.* at A1-A13.

1. In December 1995, the grand jury returned a second superseding indictment charging petitioner and 13 co-defendants with conspiracy to import and distribute cocaine and to launder the proceeds through a series of financial transactions. The indictment alleged that petitioner, a criminal defense attorney, assisted the drug traffickers by forming front corporations, opening Swiss bank accounts for transfers of money to and from the United States, and traveling to Switzerland to make deposits into those accounts. Pet. App. A2-A3; *id.* at C2.

Count 2 charged petitioner with conspiracy to import cocaine, in violation of 21 U.S.C. 963, and Count 3 charged him with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Count 18 charged him with conspiracy to violate three substantive provisions of the money-laundering statutes: Count 18(a) alleged that he conspired to violate 18 U.S.C. 1956(a)(1), Count 18(b) alleged that he conspired to violate 18 U.S.C. 1956(a)(2), and Count 18(c) alleged that he conspired to violate 18 U.S.C. 1957. He was also

charged with seven substantive counts of money laundering (Counts 19, 21, 22, 23, 24, 25, and 26), in violation of 18 U.S.C. 1956(a)(1). Pet. App. A3.

Petitioner stood trial alone. The jury acquitted him on Counts 3, 18(a), and 21 through 26. After the jury failed to reach a verdict on Counts 2, 18(b), 18(c), and 19, the district court declared a mistrial as to those counts. Pet. App. A3.

Petitioner moved for a judgment of acquittal on each of the mistried counts. The district court granted the motion with respect to Count 2, ruling that the government had failed to prove that petitioner knowingly participated in the conspiracy to import cocaine. The court denied the motion with respect to the money-laundering conspiracies charged in Counts 18(b) and 18(c) and the substantive money-laundering offense charged in Count 19. Pet. App. A3-A4; *id.* at C2.

2. In May 1997, the grand jury returned a third superseding indictment against petitioner. Pet. App. A4; *id.* at C3.

Count 2 of the third superseding indictment charged petitioner with conspiracy to import cocaine, in violation of 21 U.S.C. 963. Count 18, which charged petitioner under 18 U.S.C. 1956(h) with conspiracy to engage in money laundering, was divided into three parts. Count 18(a) alleged that petitioner conspired to violate 18 U.S.C. 1956(a)(2)(A), which prohibits transporting funds out of the United States with the intent to promote an unlawful activity. Count 18(b) alleged that petitioner conspired to violate 18 U.S.C. 1956(a)(2)(B)(i), which prohibits transporting funds out of the United States, knowing that the funds are the proceeds of unlawful activity and that the transportation is designed to conceal the nature, location, source, ownership, or control of the funds. Count 18(c) alleged that

petitioner conspired to violate 18 U.S.C. 1957, which prohibits "knowingly engag[ing] * * * in a monetary transaction in criminally derived property of a value greater than $10,000." Petitioner was also charged with 15 substantive counts of money laundering: eight counts under 18 U.S.C. 1956(a)(1)(B)(i) (Counts 19, 23, 25, 27, 30, 31, 33, and 34), six counts under 18 U.S.C. 1956(a)(1)(A)(i) (Counts 20, 24, 26, 29, 32, and 35), and one count under 18 U.S.C. 1957 (Count 28). Pet. App. A4 & n.5; Third Superseding Indictment 2-5, 16-19, 21-32.

Petitioner moved to dismiss the indictment on, *inter alia*, double jeopardy grounds. The district court held that the collateral estoppel rule of double jeopardy analysis did not bar prosecution of the money-laundering conspiracies charged in Counts 18(b) and 18(c) and the substantive money-laundering offense charged in Count 19. Pet. App. C3-C4. Noting that those counts were "based on the identical conduct that formed the basis of the three charges that resulted in a hung jury" at the first trial, the court concluded that "[n]either the Double Jeopardy Clause nor the collateral estoppel doctrine prevents the Government from retrying a defendant on mistried charges." *Id.* at C4.[1]

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[1] Count 18(b) of the second superseding indictment, which charged a conspiracy to commit money laundering in violation of 18 U.S.C. 1956(a)(2), was divided in the third superseding indictment into Count 18(a), which charged a conspiracy to violate Section 1956(a)(2)(A), and Count 18(b), which charged a conspiracy to violate Section 1956(a)(2)(B)(i). Count 18(c) charged a conspiracy to violate 18 U.S.C. 1957 in both the second and third superseding indictments. Count 19 charged the same substantive money laundering offense under 18 U.S.C. 1956(a)(1) in both the second and third superseding indictments. Pet. App. A4 & n.5.

The district court held that collateral estoppel did, however, bar prosecution of the money-laundering conspiracy charged in Count 18(a) and the substantive money-laundering offenses charged in Counts 23 through 27 and Counts 29 through 35. Pet. App. C4-C7. The court reasoned that the jury's verdicts of acquittal at the first trial—on one of the three money-laundering conspiracy charges and six of the seven substantive money-laundering charges—must have been based on the jury's finding that petitioner lacked the requisite criminal intent. *Id.* at C6. The court concluded that, because "the acquittals in the first trial established for all time [petitioner's] lack of intent to break the law while committing the acts in question," the government was precluded from establishing the essential intent elements of Counts 18(a), 23 through 27, and 29 through 35. *Id.* at C6-C7.[2]

Petitioner appealed the denial of his motion to dismiss Counts 18(b), 18(c), and 19, and the government cross-appealed the dismissals of Counts 18(a), 25, 27, 30, 31, 33, and 34. Pet. App. A4-A5.

4. The court of appeals affirmed in part, vacated in part, and remanded for further proceedings. Pet. App. A1-A13.

First, the court of appeals held, although for different reasons than those stated by the district court, that the

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[2] The court dismissed Counts 2, 20, and 28 on other grounds. The court concluded that Count 2 violated the Double Jeopardy Clause because it was identical to the previous Count 2 on which the court had granted a judgment of acquittal. Pet. App. C3 & n.2. The court concluded that Counts 19 and 20 charged the same offense twice and dismissed Count 20 as multiplicitous. *Id.* at C7-C9. The court dismissed Count 28 for failure to state an offense under 18 U.S.C. 1957. Pet. App. C9-C10. The government did not challenge those rulings on appeal.

Double Jeopardy Clause does not bar prosecution of the money-laundering conspiracies charged in Counts 18(b) and 18(c), and the substantive money-laundering offense charged in Count 19. Pet. App. A6-A10. The court did not conclude that the government may always retry a mistried count, notwithstanding the jury's acquittals on other counts. But the court found that the government could retry the three counts on which the jury failed to reach a verdict in this case, because the jury (and the district court in granting the judgment of acquittal on the deadlocked drug conspiracy count) did not necessarily find an essential element of any of those counts against the government. *Id.* at A8-A9.

The court of appeals rejected as "clearly erroneous" the district court's determination that the jury acquitted petitioner on certain of the money-laundering counts because the jury found that "he did not have the requisite criminal intent." Pet. App. A9. "If a lack of intent had been the reason for [petitioner's] acquittals," the court explained, "the jury should also have acquitted him of the substantive money laundering charge (Count 19)," but, instead, the jury failed to reach a verdict on that count. *Ibid.* The court concluded, based on the district court's jury instructions and the jury's failure to reach a verdict on Count 19, that the jury must have had a different reason for acquitting petitioner of conspiracy to engage in money laundering in violation of 18 U.S.C. 1958(a)(1)—namely, "the government's failure to prove that [petitioner] knowingly entered into an agreement to violate § 1956(a)(1) as charged in the second superseding indictment." *Ibid.* Accordingly, because an agreement to violate Section 1956(a)(1) is not an essential element or an "ultimate fact" of the offenses charged in Counts 18(b), 18(c), and 19 of the third superseding indictment,

the court held that the government is not precluded from prosecuting those counts. *Id.* at A10.

Second, the court of appeals held, for similar reasons, that the government is not precluded from prosecuting the seven counts charged for the first time in the third superseding indictment, *i.e.*, the money-laundering conspiracy charged in Count 18(a) and the substantive money-laundering offenses charged in Counts 25, 27, 30, 31, 33, and 34. Pet. App. A10-A13. The court noted that the substantive money-laundering offenses in the third superseding indictment involve different acts (*e.g.*, different financial transactions) than did the substantive money-laundering offenses in the second superseding indictment. "Thus," the court explained, "there was no issue or fact in these added counts which was necessarily decided in [petitioner's] favor in the first trial." *Id.* at A12. The court also concluded that the jury's determination that petitioner did not agree to participate in the conspiracy to violate 18 U.S.C. 1956(a)(1) does not bar his prosecution on the newly added counts, because such an agreement "is not an ultimate fact or element of a conspiracy to violate § 1956(a)(2)(A)," the conspiracy charged in Count 18(a), or of the substantive Section 1956(a)(1) offenses charged in the six remaining counts. Pet. App. A13.

ARGUMENT

1. Petitioner contends (Pet. 6-13) that the doctrine of collateral estoppel bars his prosecution for the money-laundering conspiracies charged in Count 18 and the substantive money-laundering offenses charged in Counts 19, 25, 27, 30, 31, 33, and 34 of the third superseding indictment. He further argues that the circuits are in conflict over whether a court may consider a jury's failure to reach a verdict on one count in deter-

mining the basis for the jury's acquittal on a related count. Those claims lack merit, and this Court's review is not warranted.

a. The Double Jeopardy Clause of the Fifth Amendment incorporates the doctrine of collateral estoppel, or issue preclusion, which bars a prosecution that would require the relitigation of ultimate factual issues that were resolved against the government in an earlier prosecution. *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970). A jury's acquittal of a defendant on one charge precludes the government from proceeding against him on a second charge, however, only if the jury necessarily found a fact in the defendant's favor that is an essential element of the second charge (*i.e.*, a fact that the government must prove beyond a reasonable doubt). See *Ashe*, 397 U.S. at 443-445; *Dowling* v. *United States*, 493 U.S. 342, 347-348, 350-352 (1990). The defendant bears the burden of identifying the factual issue necessarily decided at the first trial that precludes a second trial. *Dowling*, 493 U.S. at 350-351.

Here, the court of appeals correctly concluded that the jury at petitioner's trial on the second superseding indictment did not necessarily find any fact in petitioner's favor that is an essential element of the offenses charged in Counts 18, 19, 25, 27, 30, 31, 33, and 34 of the third superseding indictment. The court, recognizing that the jury had acquitted petitioner on some counts but had failed to reach verdicts on other counts, sought to ascertain the basis for the verdicts of acquittal. Pet. App. A6, A8-A9, A11. The court determined that "the only logical conclusion which reconciles the jury's acquittal on Count 18(a) [conspiracy to engage in money laundering, in violation of 18 U.S.C. 1956(a)(1)] with the jury's failure to reach a verdict on Count 19 [substantive money laundering, in

violation of 18 U.S.C. 1956(a)(1)]" was that "the jury must have based its acquittal on the § 1956(a)(1) conspiracy charge (Count 18(a)) on the government's failure to prove that [petitioner] knowingly entered into an agreement to violate § 1956(a)(1)." Pet. App. A9. Accordingly, because an agreement to violate Section 1956(a)(1) is not an essential element of the offenses charged in Counts 18, 19, 25, 27, 30, 31, 33, and 34 of the third superseding indictment, the doctrine of issue preclusion does not bar the prosecution of those counts.

There is no merit to petitioner's claim (Pet. 6-7) that the court of appeals erred by taking into account the jury's failure to reach verdicts on certain counts, as well as the jury's acquittals on other counts, in ascertaining what facts the jury necessarily found in petitioner's favor. As this Court has explained, to determine whether a defendant's prosecution is barred by collateral estoppel, a court must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444. The court's "inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ibid.* (internal quotation marks omitted). A jury's failure to reach a verdict on certain counts, while acquitting the defendant on other counts, is among the "relevant matter" that a court may consider in determining what facts the jury necessarily found in the defendant's favor. Otherwise, the courts in many cases, such as this one, would be required to assume that the jury acted irrationally in reaching a mixed verdict, contrary to this Court's recognition that collateral estoppel is "predicated on the

assumption that the jury acted rationally." *United States* v. *Powell*, 469 U.S. 56, 68 (1984).[3]

The Eleventh Circuit's approach to the issue preclusion question in this case is similar to the approach taken by the First and D.C. Circuits. See *United States* v. *Aguilar-Aranceta*, 957 F.2d 18, 24-25 (1st Cir.), cert.

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[3] In our view, that analysis indicates that collateral estoppel should never bar the government from retrying a defendant on a count on which a jury was unable to reach a verdict when the same jury acquitted him on another count. There are only two possible explanations for such a mixed verdict. First, the jury may have found that the government failed to prove a fact that, while essential for conviction on the count on which the defendant was acquitted, was not essential for conviction on the count on which the jury was deadlocked. As explained above, if the jury did not find an essential fact in the defendant's favor on the acquitted count that would have to be proved in retrying the defendant on the "hung" count, collateral estoppel does not bar retrial on the latter count. See *Dowling*, 493 U.S. at 347-348. Second, the jury may have found that the government failed to prove a fact that was essential for conviction on both counts. In that case, the jury's failure to acquit on one count would be inconsistent with the jury's acquittal on the other count. As this Court has recognized, "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful" when the jury's verdict is inconsistent. *Powell*, 469 U.S. at 68; see *Standefer* v. *United States*, 447 U.S. 10, 23 n.17 (1980) (inconsistency in jury verdicts "is reason, in itself, for not giving preclusive effect to the acquittals"). Accordingly, under either explanation for the jury's verdict of acquittal on one count, the government would not be precluded from retrying the defendant on another count on which the jury was deadlocked. To date, the courts of appeals have not agreed with that analysis. See, *e.g.*, *United States* v. *Bailin*, 977 F.2d 270, 275-280, 282-283 (7th Cir. 1992); *United States* v. *Frazier*, 880 F.2d 878, 882-883 (6th Cir. 1989), cert. denied, 493 U.S. 1083 (1990). Acceptance of that analysis, however, is not essential to the judgment in this case.

denied, 506 U.S. 834 (1992); *United States* v. *White*, 936 F.2d 1326, 1328-1329 (D.C. Cir.), cert. denied, 502 U.S. 942 (1991). In those cases, the defendant was charged with multiple counts that involved a common issue, such as the defendant's knowledge or intent. The jury acquitted the defendant on one count and deadlocked on another count. The courts of appeals, taking into account both the jury's verdict of acquittal on one count and the jury's failure to reach a verdict on the other count, declined to hold that the verdict of acquittal rested on a finding in the defendant's favor on the common issue. The courts instead reasoned that the verdict of acquittal could more rationally be explained as resting on the jury's finding on an issue that was not common to both counts. *Aguilar-Aranceta*, 957 F.2d at 24-25; *White*, 936 F.2d at 1329; accord *United States* v. *Deerman*, 837 F.2d 684, 690-691 (5th Cir.) (in considering whether the government was precluded from prosecuting the defendants on drug importation charges, the court considered both the jury's verdicts of acquittal on drug possession charges and the jury's failure to reach verdicts on drug importation charges), cert. denied, 488 U.S. 856 (1988).

b. Petitioner contends (Pet. 7-11) that the decision below conflicts with the decisions of four other circuits. While there is some tension between the approach of the court of appeals in this case, which sought to reconcile the jury's acquittals on some counts with its failure to reach verdicts on other counts, and the reasoning applied in some other circuits, which have declined to consider whether a determination that a jury's acquittal on one count rested on a particular ground would be consistent with the jury's failure to reach a verdict on a related count, there is not at this time a

square conflict in the circuits on the proper collateral estoppel analysis in such cases.

The earliest case cited by petitioner, *United States* v. *Mespoulede*, 597 F.2d 329 (2d Cir. 1979), is not on point. In that case, the jury acquitted the defendant on a drug possession charge, but failed to reach a verdict on a drug conspiracy charge. The government retried the defendant on the conspiracy charge, presenting evidence of his drug possession as proof of the conspiracy, and the jury found the defendant guilty of that charge. The court of appeals reversed the conviction, holding that the government was precluded from seeking to prove the conspiracy charge with evidence that the defendant possessed the drug, because the jury's acquittal on the drug possession charge at the first trial necessarily determined that he did not. *Id.* at 332-336. Contrary to petitioner's assertion (Pet. 7), *Mespoulede* did not "rule[] that the government was estopped from retrying the defendant on the conspiracy count." It determined instead what evidence was admissible at an undisputably permissible retrial. Cf. *United States* v. *Felix*, 503 U.S. 378, 389 (1992) (double jeopardy does not bar prosecution of a conspiracy charge after previous prosecution for related substantive offenses). In any event, *Mespoulede* has been effectively overruled by this Court's decision in *Dowling*, which held that collateral estoppel does not bar the admission of evidence of a fact resolved in a defendant's favor at the first trial, provided that the government is not seeking to prove that fact beyond a reasonable doubt at the second trial. Compare *Dowling*, 493 U.S. at 347-350, with *Mespoulede*, 597 F.2d at 334-335; see also *United States* v. *Bailin*, 977 F.2d 270, 277 n.9 (7th Cir. 1992) (noting that "*Mespoulede*, insofar as it held that issue

preclusion applies to evidentiary as well as ultimate facts, has been partially overruled by *Dowling*").[4]

In *Bailin*, the jury was unable to reach a verdict on the counts charging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), but it acquitted the defendant on some of the other counts, which charged offenses that were also among the predicate racketeering acts alleged in the RICO counts. See 18 U.S.C. 1961(1) and (5) (defining "racketeering activity" and "pattern of racketeering activity" under RICO). The Seventh Circuit held that, although the government could retry the defendant on the RICO counts (and other counts on which the jury had deadlocked), the government could not base the RICO counts on predicate acts of which the defendant was acquitted. 977 F.2d at 275-283. In so holding, the Seventh Circuit, consistent with the Eleventh Circuit here, recognized that the government is not precluded from retrying a defendant on a count on which the jury failed to reach a verdict, unless the defendant has met the "extremely difficult" burden of establishing that, in

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[4] Petitioner also asserts (Pet. 10) that the decision below conflicts with *United States* v. *Corley*, 824 F.2d 931 (11th Cir. 1987). An intracircuit conflict does not, however, warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Nor does any such conflict exist. Like *Mespoulede*, *Corley* involved the exclusion of evidence, which related to a count on which the defendant had been acquitted, at a retrial on another count on which the jury had failed to reach a verdict. And like *Mespoulede*, *Corley* has been effectively overruled by *Dowling*. See also *United States* v. *Shenberg*, 89 F.3d 1461, 1480 n.23 (11th Cir. 1996) (circuit precedent "hold[ing] that the doctrine of collateral estoppel bars the government from introducing the underlying evidence of acquitted substantive counts in the retrial of the mistried conspiracy" "no longer constitutes good law" after *Dowling*), cert. denied, 519 U.S. 1117 (1997).

rendering an acquittal on a different count, the jury "necessarily determined" an essential element of the count to be retried. *Id.* at 282. The government did not dispute that the jury, in acquitting the defendant on certain counts that doubled as RICO predicate acts, necessarily decided that the defendant did not commit those acts. While the court rejected the government's argument that collateral estoppel never applies to a retrial of counts on which the jury failed to reach a verdict, and expressed the view that the jury's failure to agree on a verdict is "too inconclusive" to support an argument that hung counts are necessarily "inconsistent" with acquitted counts, see *id.* at 275-280, 282-283; note 3, *supra*, the court was not required in *Bailin*, as in this case, to ascertain the ground on which the jury acquitted the defendant on certain counts of an indictment. No conflict thus exists between this case and *Bailin*.

In *United States* v. *Frazier*, 880 F.2d 878 (6th Cir. 1989), cert. denied, 493 U.S. 1083 (1990), the court held, among other things, that the defendants could not be retried on a charge of making false entries with respect to one loan, on which the jury had deadlocked, because the jury had acquitted the defendants on a charge of misapplication of bank funds with respect to the same loan. The court reasoned that the only disputed evidence on the misapplication count related to the issue of intent to defraud, and that a jury could not find that the defendants lacked the requisite intent on the misapplication count without also finding that they lacked the requisite intent on the related false entries count. *Id.* at 886. No similar circumstances, in which the jury's verdict of acquittal on one count could be explained *only* on a ground inconsistent with the jury's failure to reach a verdict on another count, exist in this case.

Finally, in *United States* v. *Romeo*, 114 F.3d 141 (9th Cir. 1997), the court of appeals held that the defendant's acquittal on a drug possession count barred his retrial on a drug importation count on which the jury failed to reach a verdict. The court concluded that "a rational jury could [not] have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," *i.e.*, that the defendant did not know that marijuana was in the trunk of the car that he drove from Mexico to the United States. *Id.* at 143. The court rejected the dissent's argument that the verdict of acquittal must have rested on another ground—that the defendant lacked intent to distribute marijuana—because the jury should have acquitted on both counts if it found that the defendant lacked knowledge of the marijuana. The court reasoned that its interpretation of the jury's verdict of acquittal "attributes much less irrationality to the jury than does the dissent's reading," because a "necessary corollary" of the dissent's interpretation was that, "although [the defendant] knowingly possessed the marijuana, he possessed the 188 pounds of marijuana *without* the intent to distribute it." *Id.* at 144.

This case is distinguishable from *Romeo*. The Eleventh Circuit's reading of the jury's verdict of acquittal as resting on the absence of an agreement to engage in money laundering does not imply that the jury irrationally rejected inferences from the evidence. It is true that the Ninth Circuit's statement in *Romeo* that "[t]he inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not on why the jury could not agree on the deadlocked count," 114 F.3d at 144, is in tension with the Eleventh Circuit's approach here in assessing the basis for the jury's verdict of acquittal. But neither *Romeo* nor any other case cited

by petitioner holds that a jury's failure to reach a verdict on one count is always irrelevant in determining what facts the jury necessarily found in acquitting the defendant on another count. Accordingly, because no square conflict has yet arisen among the circuits with respect to the application of collateral estoppel in cases involving mixed verdicts, this Court's review is not warranted.

2. Petitioner also contends (Pet. 14-24) that the new counts included in the third superseding indictment (Counts 25, 27, 30, 31, 33, and 34) are barred by the Double Jeopardy Clause, the Due Process Clause, and res judicata. The Eleventh Circuit did not address those contentions, as petitioner concedes (Pet. 6). This Court ordinarily does not consider arguments not expressly ruled upon by the courts below. See, *e.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 119 S. Ct. 924, 930 (1999) (citing additional cases). In any event, petitioner's contentions lack merit.

Petitioner's double jeopardy claim is foreclosed by *United States* v. *Dixon*, 509 U.S. 688, 703-704 (1993). The Court held in *Dixon* that the sole test for determining whether two offenses are separate for double jeopardy purposes is that set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), *i.e.*, "whether each offense contains an element not contained in the other." *Dixon*, 509 U.S. at 696. Because petitioner does not, and cannot, contend that any of the new counts are not separate offenses under the *Blockburger* test, his double jeopardy claim necessarily fails.

Relying on *Brown* v. *Ohio*, 432 U.S. 161 (1977), petitioner nonetheless argues (Pet. 16-17) that the Double Jeopardy Clause and the Due Process Clause bar a successive prosecution when the government could have brought all the charges in a single prosecution by

exercising "due diligence." That argument rests on a misreading of *Brown*. Applying the *Blockburger* test, the Court held in *Brown* that the Double Jeopardy Clause "forbids successive prosecution and cumulative punishment for a greater and lesser included offense." 432 U.S. at 169. The Court then noted that "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." *Id.* at 169 n.7. Petitioner's argument would turn that exception on its head by imposing a "due diligence" requirement on the government's ability to bring a second prosecution otherwise permitted by *Blockburger*. That rule would simply reformulate the "same conduct" test of *Grady* v. *Corbin*, 495 U.S. 508 (1990), which was explicitly overruled in *Dixon*. See *Dixon*, 509 U.S. at 705 (recognizing that the Double Jeopardy Clause leaves the government "entirely free to bring [its prosecutions] separately").

Petitioner claims support for his reading of *Brown* in *Rashad* v. *Burt*, 108 F.3d 677 (6th Cir. 1997), cert. denied, 522 U.S. 1075 (1998), a decision that is inconsistent with this Court's precedents, that has been severely limited by the Sixth Circuit itself, and that is distinguishable from the present case. In *Rashad*, the defendant was successively prosecuted for possession with intent to deliver two quantities of cocaine that were seized at the same time from his house and his car. In holding that the second prosecution, which involved the cocaine found in the car, was barred by the Double Jeopardy Clause, the Sixth Circuit purported to state "[t]he proper standard for determining * * * if the two prosecutions violate double jeopardy": "whether the actual evidence needed to convict the defendant in

the first trial is the same as the evidence needed to obtain the second conviction * * * irrespective of whether the convictions are under statutes that satisfy *Blockburger*'s 'same elements' test." 108 F.3d at 680. The court did not acknowledge or discuss this Court's decision in *Dixon*, which overruled *Grady*'s "same conduct" test for successive prosecutions and held that the only applicable test was that set forth in *Blockburger*. See *United States* v. *Williams*, 155 F.3d 418, 421 (4th Cir.) (rejecting *Rashad* as "inconsistent with a wealth of Supreme Court authority" including *Dixon*), cert. denied, 119 S. Ct. 626 (1998). The Sixth Circuit has since "narrowly" read *Rashad* as applying only "to circumstances such as were present in that case," *i.e.*, "where the concern is whether the prosecution has impermissibly divided the defendant's conduct so that it may bring repeated prosecutions under the same statute." *United States* v. *Forman*, 180 F.3d 766, 770 (1999). This case does not involve those particular concerns.[5]

Nor is there any merit to petitioner's claim that res judicata requires the government to bring all related charges against a defendant in a single proceeding. In criminal cases, the doctrine of res judicata, or claim

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[5] Petitioner also relies on the Eleventh Circuit's own decision in *United States* v. *Reed*, 980 F.2d 1568, cert. denied, 509 U.S. 932 (1993). In that case, after holding that the Double Jeopardy Clause barred the defendant's prosecution on a continuing criminal enterprise charge, the court stated in dicta that the prosecution would also have been barred by a due diligence requirement, because the government knew or should have known of the facts underlying that charge at the time of the defendant's prior prosecution. *Id.* at 1580-1581. The Eleventh Circuit, however, has since made clear that *Brown* imposes no such due diligence requirement. *United States* v. *Maza*, 983 F.2d 1004, 1008 & n.8 (1993).

preclusion, has been said to mean that, "[w]here a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication * * * is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense." *United States* v. *Oppenheimer*, 242 U.S. 85, 88 (1916); see *Sealfon* v. *United States*, 332 U.S. 575, 578 (1948).[6] Petitioner offers no authority applying res judicata in the criminal context to preclude a defendant's subsequent prosecution not only for an offense that was charged in a previous prosecution but also for a separate offense that could have been charged but was not. Such a rule would effectively resurrect *Grady* under the rubric of res judicata. Nor would such a rule necessarily benefit petitioner in any event. Res judicata applies in the civil context only after a case has

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[6] In *Oppenheimer*, the Court held that an indictment for conspiracy to conceal assets from a bankruptcy trustee was barred by res judicata because a previous indictment for the same offense had been dismissed on statute of limitation grounds. 242 U.S. at 87-88. The Court explained that "[a] plea of the statute of limitations is a plea to the merits, * * * and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution." *Ibid.* In *Sealfon*, the Court held that the defendant's acquittal on a conspiracy charge at his first trial required reversal of his conviction for aiding and abetting at his second trial, because both prosecutions were based on proof of an agreement between the defendant and a co-defendant that "was necessarily adjudicated in the former trial to be non-existent." 332 U.S. at 580. *Sealfon* thus involved an application of issue preclusion. Although the Court in *Sealfon* stated that res judicata "operate[d] to conclude those matters in issue which the verdict determined though the offenses be different," *id.* at 578, the Court was obviously using the term "res judicata" to include issue, as well as claim, preclusion.

been fully and finally adjudicated. *Rivet* v. *Regions Bank*, 522 U.S. 470, 476 (1998). This case does not involve a second separate prosecution of petitioner, but rather a continuation of his first prosecution, which has not yet been fully and finally adjudicated. Cf. *Bailin*, 977 F.2d at 276 (recognizing that a retrial on a deadlocked count is, for double jeopardy purposes, viewed as "a 'continuation' of the first trial") (citing *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

OCTOBER 1999